

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1897

No. 106.

THE TERRITORY OF NEW MEXICO, APPELLANT,

vs.

THE UNITED STATES TRUST COMPANY OF NEW YORK
AND C. W. SMITH, RECEIVER OF THE PROPERTY OF
THE ATLANTIC AND PACIFIC RAILROAD COMPANY

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF
NEW MEXICO.

FILED MAY 1, 1897.

(16,578.)

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THE UNITED STATES TRUST COMPANY OF NEW YORK
AND C. W. SMITH, RECEIVER OF THE PROPERTY OF
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NEW MEXICO.

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cree of the court requiring the said receiver to pay said taxes, which said stipulation is in the words and figures following, that is to say :

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising Under the Constitution and Laws of the United States.

THE UNITED STATES TRUST COMPANY OF NEW YORK,	} No. 1122.
Complainant,	
vs.	
ATLANTIC AND PACIFIC RAILROAD COMPANY <i>et al.</i> , De-	}
fendants.	

In the Matter of the Intervening Petition for THE TERRITORY OF NEW MEXICO.

4 *Stipulation.*

It is hereby stipulated and agreed by and between the parties hereto, as follows :

First. That the Territory of New Mexico, through its solicitor, Thomas N. Wilkerson, district attorney of Bernalillo county, in said Territory, waives the service upon it of any notice or citation upon appeal, and enters its appearance in the said appeal, both in the district court and the supreme court of the Territory when the transcript on appeal shall be filed there.

Second. It is agreed between the parties that the following papers shall constitute the transcript of the record in this cause for the purpose of hearing the appeal therein :

The bill of complaint filed by the complainant, and a copy of the order appointing C. W. Smith receiver in the above-entitled cause.

The intervening petition filed in said cause on behalf of the Territory of New Mexico.

The order to show cause issued thereon with the proof of service.

The answer of the complainant, The United States Trust Company, to the intervening petition.

The answer of the receiver, C. W. Smith, to the intervening petition.

The agreed statement of facts upon which the hearing was had, and a copy of the exhibits attached to the intervening petition, and a copy of the exhibits attached or referred to in each of the answers, and a copy of the exhibits attached to the agreed statement of facts, provided, however, that whenever the exhibits above referred to are duplicates, only one copy need be placed in transcript coupled with the statement of the clerk of the district court that such other exhibits omitted are duplicates and are omitted on that account.

5 A copy of the decision of Judge Collier, and a copy of the final decree, and a copy of this stipulation.

F. B. JENNINGS,
Solicitor for Complainant.

C. N. STERRY,
Solicitor for Receiver.

THOS. N. WILKERSON,
Solicitor for New Mexico.

Be it remembered that heretofore, to wit, on the 16th day of July, 1895, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, sitting for the trial and hearing of causes arising under the Constitution and laws of the United States a bill of complaint which said bill of complaint is in the words and figures following, to wit:

- 6 In the District Court of the Second Judicial District of the Territory of New Mexico for the trial and Hearing of Causes Arising under the Constitution and laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK,
Complainant,
against

ATLANTIC AND PACIFIC RAILROAD COMPANY, ATCHISON, Topeka and Santa Fe Railroad Company, St. Louis and San Francisco Railway Company; Aldace F. Walker, John J. McCook, and Joseph C. Wilson, as Receivers of the Property and Franchises of Atlantic and Pacific Railroad Company; Aldace F. Walker, John J. McCook, and Joseph C. Wilson, as Receivers of the Property and Franchises of Atchison, Topeka and Santa Fe Railroad Company; Aldace F. Walker, John J. McCook, and Joseph C. Wilson, as Receivers of the Property and Franchises of St. Louis and San Francisco Railway Company; The Mercantile Trust Company, and The Boston Safe Deposit and Trust Company, Defendants.

In Equity.

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Bill of Complaint.

To the Honorable Needham C. Collier, judge of the district court of the second judicial district of the Territory of New Mexico:

Your orator United States Trust Company of New York, a corporation duly created by and under the laws of the State of New York and a citizen of the said State, having its principal office and place of abode in the city of New York, brings this, its bill, by leave of the court first had and obtained, against Atlantic and Pacific Railroad Company, a corporation created, organized and existing under and by virtue of the laws of the United States of America, and having its principal office and place of abode at Albuquerque, in the Territory of New Mexico; the Atchison, Topeka and Santa Fe Railroad Company, a corporation duly organized and existing under and by virtue of the laws of the Territory and State of Kansas, and having its principal office and place of abode in and being a citizen and resident of said State; the St. Louis and San Francisco Railway Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of Missouri, and having its principal office and place of abode in and being a citizen and resident of the said State; Aldace F. Walker, as receiver, a citizen of

the State of Illinois, and having his place of abode at Chicago, in said State; John J. McCook, as receiver, a citizen of the State of New York, and having his place of abode in the city of New York, in the said State; Joseph C. Wilson, as receiver, a citizen of the State of Kansas, and having his place of abode at Topeka, said State; the Mercantile Trust Company, a corporation duly created, organized and existing under and by virtue of the laws of the State of New York, and a citizen of said State, having its principal office and place of abode in the city of New York, in said State; and the Boston Safe Deposit and Trust Company, a corporation duly organized and existing under the laws of the State of Massachusetts, and a citizen of said State, having its principal office and place of abode at Boston, in said State; and thereupon your orator complains and says:

First. Your orator is a corporation, bearing the corporate name of United States Trust Company of New York, duly created and existing under the laws of the State of New York, and is a citizen of said State, and has its principal office and place of business in the city of New York, and as such corporation is fully authorized and empowered to hold in trust the property conveyed to it in trust as herein after fully stated, and to execute the trusts reposed in it under and by virtue of the mortgage or deed of trust hereinafter described.

Second. That the defendant, Atlantic and Pacific Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of the United States of America, to wit, an act of Congress approved July 27, 1866, being a public act to which your orator prays leave to refer as a part of this bill, as fully as though incorporated in the body thereof; and the acts of Congress supplementary thereto and amendatory thereof, including particularly an act approved April 20, 1871, to which your orator prays leave to refer as part of this bill, as fully as though incorporated in the body thereof.

Third. That the defendant, Atlantic and Pacific Railroad Company, duly complied with the provisions of said acts of Congress, and became and was thereby duly authorized and empowered to and did thereafter construct or acquire by purchase or lease, and operate and maintain the railroads and other property hereinafter mentioned.

Fourth. That in order to secure the bonds to be issued by it, said defendant Atlantic and Pacific Railroad Company, on or about the 1st day of July, 1880, being thereunto by law in all respects duly authorized, and due corporate action having been had, made, executed and delivered to your orator as trustee a certain mortgage or deed of trust called the Western Division first mortgage of said defendant, bearing date the 1st day of July, 1880, in and by which it conveyed to your orator as trustee all and singular its railway and property, real, personal and mixed, and all franchises of every kind or description and wheresoever situated, then or thereafter composing or pertaining to that part of the railroad and telegraph line of said defendant known as the Western division, by the following description (the words "part of the first part," referring to said

defendant, and the words "party of the second part," referring to your orator,) to wit:

"The franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies and all property of every description now and hereafter composing and pertaining to that part of the railroad and telegraph line of the party of the first part known as the Western division, beginning at Albuquerque, on the Rio Grande river, in the Territory of New Mexico, and thence running by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such point as may be selected by the party of the first part for crossing, and thence by the most practicable and eligible route to the Pacific ocean, or however otherwise said Western division may be located or described; and also all additions and extensions which the party of the first part may make to said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges, and appurtenances thereunto belonging, or in anywise appertaining, and also all the estate right, title, interest, property, possession, claim, and demand whatsoever, both in law and equity, of the party of the first part of, in and to the same, and any and every part thereof, with the appurtenances."

10 That since the execution of said Western Division first mortgage said defendant Atlantic and Pacific Railroad Company has acquired a large amount of railroad, engines, cars and other equipment and other personal property, and a large amount of real estate and interests in and rights to real estate, all of which became and are subject to the lien of said mortgage, and the said mortgage is and remains a valid and subsisting lien upon all the property described therein, and upon said subsequently acquired property, and upon all the property, rights and franchises granted to and conferred upon the said Atlantic and Pacific Railroad Company by the acts of Congress hereinbefore mentioned or subsequently acquired thereunder.

Fifth. That being thereunto by law in all respects duly authorized, and due corporate action having been had, and under and in accordance with the provisions of said Western Division first mortgage, said defendant Atlantic and Pacific Railroad Company, on and subsequently to said 1st day of July, 1880, made, executed and delivered its bonds, all bearing date on that day, to an amount not exceeding \$25,000 a mile, and amounting in the aggregate to \$16,000,000, as follows, viz:

(a.) 15,950 coupon bonds, each for the sum of \$1,000, amounting in the aggregate to \$15,950,000, in and by each of which bonds the said defendant Atlantic and Pacific Railroad Company promised to pay to your orator, as trustee, or to the bearer thereof

11 on the 1st day of July, 1910, at the agency of the railroad company in the city of New York, the sum of \$1,000 in gold coin of the United States of America, and also to pay interest thereon

at the rate of six per cent. per annum in like gold coin semi-annually on the first days of January and July in each year, at the agency of said company in the city of New York, on presentation as they severally became due of coupons for such interest annexed to said bonds and payable to bearer.

(b.) Ten registered bonds each for the sum of \$5,000, and amounting in the aggregate to \$50,000, in and by each of which bonds the said defendant, Atlantic and Pacific Railroad Company, promised to pay to your orator, as trustee, or to the registered holder thereof, the sum of \$5,000 on the 1st day of July, 1910, in gold coin of the United States of America, at the agency of the railroad company in the city of New York, and also to pay interest thereon at the rate of six per cent. per annum in like gold coin semi annually on the first days of January and July in each year, at the agency of the railroad company in the city of New York.

Sixth. That all of said bonds, amounting in the aggregate to \$16,000,000 of principal, were duly issued by said defendant, Atlantic and Pacific Railroad Company, and authenticated by the certificate thereon signed by your orator in accordance with the provisions of said bonds and of said Western Division first mortgage or deed of trust, and were duly negotiated and delivered for value prior to the defaults hereinafter mentioned; and all of said bonds are now outstanding and are valid obligations of said defendant, Atlantic and Pacific Railroad Company. That

12 a true copy of said Western Division first mortgage, dated July 1, 1880, in which are set forth true copies of said coupon bonds and of said registered bonds, is hereto annexed marked "Exhibit A," and your orator prays that the same may be taken as part of this bill of complaint as fully as though incorporated in the body thereof.

Seventh. That prior to the making and issue of the said Western Division first mortgage six per cent. bonds, the defendants, Atchison, Topeka and Santa Fe Railroad Company, and St. Louis and San Francisco Railway Company, acquired the control of the defendant Atlantic and Pacific Railroad Company, through the purchase and ownership of a majority of its capital stock; that the said bonds were issued and disposed of for the purpose of completing the line of railroad of the Atlantic and Pacific Railroad Company, known as its Western division, from Albuquerque, on the Rio Grande river, in the Territory of New Mexico, to The Needles, on the Colorado river, on the boundary of the State of California, in order to form, with the railroads of the said Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company a through line to the Pacific coast, and that for good and valuable considerations, as additional security for the payment of the principal and interest of the said bonds, the said Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway Company on the 1st day of July, A. D. 1880, made and executed an agreement whereby they severally covenanted and agreed with the Atlantic and Pacific Railroad Company and your orator,

as trustee of said mortgage, that if the earnings from the said Western division should prove insufficient to pay all coupons on said bonds as they matured, they would contribute ratably

13 for the purpose of paying and cancelling the same, such sum as might be necessary for the purpose, from their respective earnings upon all business arising from and delivered to said Western division, not exceeding twenty-five per cent. of the gross amount of their said described earnings. That a copy of said agreement of guaranty is hereto annexed marked "Exhibit B," and your orator prays that the same may be taken as a part of this bill of complaint, with the same effect as if fully incorporated in the body thereof.

Eighth. That on or about the 1st day of October, 1880, the said defendant Atlantic and Pacific Railroad Company made, executed and delivered to the said defendant, The Boston Safe Deposit and Trust Company, as trustee, a certain mortgage, or deed of trust, known as its income mortgage, bearing date on that day, in and by which it agreed with the said trustee to make up and furnish to said trustee from time to time a fair and just account of payments and expenses and gross and net earnings of said Western division for the six months ending on each first day of January and July in each year, so as to exhibit the true sum applicable to the payment of interest on the income bonds referred to in said trust deed, and to pay the said interest or so much thereof as has been earned on the first days of April and October in each year. That the said indenture was made for the purpose of securing the payment of the principal and interest of bonds to be issued under the said indenture to an amount not exceeding \$18,750 a mile of completed road, and that, as your orator is informed and believes, such income bonds have been issued thereunder and are now outstanding to an amount in the aggregate of \$12,000,000. But your orator charges that the lien and obligation of the said bonds against the defendant Atlantic and Pacific Railroad Company and its property, if any, are inferior and subordinate to the lien and obligation of the bonds secured by the said Western division first mortgage.

14 Ninth. That on or about the first day of September, 1887, the said defendant Atlantic and Pacific Railroad Company, made, executed and delivered unto the defendant, The Mercantile Trust Company, its certain second mortgage or deed of trust upon the said Western division, bearing date on that day, in and by which it conveyed to the said Mercantile Trust Company, as trustee, the property in said mortgage described, being the same property previously conveyed by the said Western division first mortgage as hereinbefore described. That the said mortgage was made to secure the due payment of the principal and interest of bonds known as second mortgage six per cent. guaranteed gold bonds of the Atlantic and Pacific Railroad Company, Western division, limited to \$10,000 a mile of completed railroad of the Western division of said railroad company, to be guaranteed severally, but not jointly, as to the payment of one-half of the principal and interest by the Atchison, Topeka and Santa Fe Railroad Company and as to the payment of one-half

of the principal and interest by the St. Louis and San Francisco Railway Company, which said last-named two companies joined in the execution of the mortgage above set forth as guarantors of the payment of said principal and interest; which said bonds were each for the principal sum of \$1,000, payable on the 1st day of September, 1907, and to bear interest at the rate of six per cent. per annum, payable semi-annually on the first days of March and September in each year, at the agency of said railroad company in the city of New York.

That of the bonds authorized to be issued under and 15 to be secured by said mortgage or deed of trust, the defendant Atlantic and Pacific Railroad Company has made and issued, as your orator is informed and believes, second-mortgage six per cent. guaranteed gold bonds for the principal sum of \$5,600,000, of which, \$5,500,000 are now actually outstanding, and all, or the greater part of which, were taken by the defendants Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway Company as security for, or in payment of, debts claimed to be due to them from the Atlantic and Pacific Railroad Company, and such bonds are now held by them. That the lien and claim of the said second-mortgage six per cent. guaranteed gold bonds upon the railroad and property of the defendant Atlantic and Pacific Railroad Company, if any, are expressly subject, subordinate and inferior to the lien of the Western Division first mortgage hereinbefore referred to.

Tenth. That on each of the first days of January and July, 1894, and January and July, 1895, the holders of said Western Division first-mortgage six per cent. bonds to the amount of \$16,000,000, were entitled to collect and receive from said defendant Atlantic and Pacific Railroad Company, the interest falling due on said bonds on each of said first days of January and July in each of said years respectively, being the semi-annual installments of interest due on each of said bonds on said dates; but the said defendant Atlantic and Pacific Railroad Company made default in the payment of said interest; and said semi-annual installments of interest falling due on the said dates respectfully, together with certain interest previously due on said bonds, remain wholly due and unpaid.

Eleventh. That on or about the 30th day of December, 1893, the defendant, The Mercantile Trust Company, filed in this court 16 its bill of complaint against the said defendant Atlantic and Pacific Railroad Company, and therein set forth, among other things, that the said complainant was the trustee under the second mortgage upon the Western division of said company hereinbefore mentioned; that in and by said mortgage the said defendant Atlantic and Pacific Railroad Company agreed, among other things, promptly to pay all taxes and assessments upon the premises conveyed thereby, but that the said company had wholly failed to keep and perform its said covenants, and that there were then due large amounts of unpaid taxes in the Territories of Arizona and New Mexico; that the said complainant had duly demanded that the said railroad

company should keep and perform its said covenants, but that the said railroad company had wholly failed and refused to comply with such demand; and the said complainant in said cause further showed that the defendant Atlantic and Pacific Railroad Company was wholly and totally insolvent and unable to meet its existing and presently accruing obligations, and that the interests of the holders of the second-mortgage bonds secured by said mortgage were seriously imperiled thereby, and unless accorded judicial protection would be wholly lost, to the great detriment and damage of said bondholders.

That upon the filing of said bill such proceedings were thereupon had, that on January 4, A. D. 1894, the Honorable Needham C. Collier, a judge of this court, made an order appointing Joseph W. Reinhart, John J. McCook and Joseph C. Wilson, receivers, as in said bill prayed, of all and singular the lands, tenements and hereditaments of the defendant Atlantic and Pacific Railroad Company covered by the said second mortgage, which order was duly filed in said cause on said 4th day of January, 1894. That, as your orator is informed and believes, the said Joseph W. Reinhart, John J. McCook and Joseph C. Wilson filed their bonds and qualified as such receivers and entered into possession of all the real estate and property of the Western division of said defendant railroad company

and continued in such possession until the 23rd day of August, 17 1894, on which date the said Joseph W. Reinhart resigned as such receiver, and by an order made and entered in said cause on or about that day, Aldace F. Walker was appointed receiver in his place and duly filed his bond and qualified as such receiver and entered into possession of the said railroad and property as coreceiver with said John J. McCook and Joseph C. Wilson; and from and after said date said Aldace F. Walker, John J. McCook and Joseph C. Wilson, as such receivers, have had and now have the actual possession, custody and control of all the property known as the Western division of the said railroad company covered by the said second mortgage and being the same property covered by and included in the said Western Division first mortgage to your orator as aforesaid; and, by reason of the fact that this court has, by the appointment of such receivers, taken into its custody and possession all of said mortgaged property situated within the jurisdiction of this court, your orator believes that it cannot proceed to adequately enforce the security provided in and by the said mortgage in any other court, and your orator is without remedy save in this court. That by an amended and supplemental bill of complaint, heretofore filed in said cause, your orator has been made a party defendant thereto for the sole avowed purpose of ascertaining the amount due on said first-mortgage bonds. Your orator prays leave to refer to the said bill of complaint of The Mercantile Trust Company, and to the order appointing said receivers and to all other acts and proceedings

18 in said cause on file in this court, as part of this, your orator's bill of complaint, with the same effect as if fully incorporated in the body thereof.

Twelfth. And your orator further shows that the defendants Atchison, Topeka and Santa Fe Railroad Company and St. Louis and San Francisco Railway Company have wholly made default in the fulfillment of their agreement hereinbefore mentioned to contribute to the extent of twenty-five per cent. of their earnings from business interchanged with the Atlantic and Pacific Railroad Company toward the payment of the interest upon the said first-mortgage bonds, and that the receivers of property and franchises of said two companies, who were also appointed receivers of the railroads and property of the defendant Atlantic and Pacific Railroad Company, have likewise wholly failed to fulfill and carry out the said agreement.

That there are important and nice questions in dispute between said three railroad companies and their respective receivers, growing out of various contracts for the operation of said Atlantic and Pacific railroad and the payment of its bonded and guaranteed debt, and that, as your orator is advised and believes, it is not practicable for the receivers of said Atchison, Topeka and Santa Fe railroad and said St. Louis and San Francisco railway to adequately assert and protect the interests of said Atlantic and Pacific first-mortgage bondholders.

Thirteenth. And your orator further shows that the said defendant Atlantic and Pacific Railroad Company is hopelessly insolvent and unable to pay its indebtedness now outstanding to a large amount, including the overdue interest upon its first-mortgage bonds hereinbefore mentioned, and that the said defendant railroad company cannot secure the means of paying the said overdue

19 obligations; and that it is necessary for the protection of the holders of said bonds issued under said Western Division first mortgage, that the property of said railroad company should be sold without delay. That the property and premises covered by the said first mortgage so made to your orator as aforesaid, are and constitute very inadequate security for the payment of the amounts due on the said bonds, and that the said mortgaged property and premises are so situated that they cannot, nor can any part thereof, be sold in parcels without great injury to the interests of the beneficiaries under your orator's trust, and all persons interested in the property of said defendant railroad company.

Fourteenth. That default has been made in the payment of interest upon all of said first-mortgage bonds and such default has continued during more than six consecutive months; that the holders of the entire amount of the bonds secured by the said first mortgage, have joined in a demand requiring your orator, as trustee under said mortgage or deed of trust, to file this bill and have concurred in the application for a decree for the foreclosure of said mortgage and the sale of the mortgaged premises, and for the appointment in the meantime of a receiver thereof; that the holders of all of said bonds have likewise united in a declaration electing that the principal of the said bonds shall be considered due, and that by reason of the facts hereinbefore alleged, the whole amount of the principal of said bonds, as well as all interest due thereon, as hereinbefore mentioned, is now due and payable, and that your orator

is entitled to apply to this court for the foreclosure and sale of the premises covered by the said first mortgage, and for the appointment in the meantime of a receiver of said mortgaged premises in the interest of said first-mortgage bondholders.

20 Fifteenth. That no proceedings have been had at law or in equity for the collection of said mortgage debt or any part thereof.

In consequence of the embarrassed condition of the financial affairs of the defendant railroad company and on account of the many difficulties which are manifestly, from the allegations hereinbefore contained, involved in the execution of your orator's said trust, it is impossible for your orator, as trustee under said first mortgage, to execute its said trust in the way and manner specified and provided in and by the said mortgage without the aid or interposition of this honorable court, in chancery sitting, nor can the said trust be executed, as your orator is advised and charges, and the rights of your orator be fully protected in the premises otherwise than by judicial sale of the mortgaged premises and of all the franchises, property, premises and appurtenances of said defendant railroad company; and your orator is likewise advised and charges that until such sale can be had and the proceeds thereof distributed, it is expedient and necessary that the franchises, property, premises and appurtenances so mortgaged to your orator in trust, as aforesaid, and all the rights, franchises and property of said railroad company of whatever name, nature or description covered by said mortgage, including all its moneys on hand and the earnings of the same, be placed in and continue in the hands and under the control of a receiver appointed herein by this court, with such proper powers and control over the same as to the court shall seem right and equitable to be conferred.

Sixteenth. That this suit is one arising under the Constitution and laws of the United States, and that the matter in controversy herein is upwards of five thousand dollars exclusive of costs.

21 In consideration whereof, and forasmuch as your orator is remediless in the premises by the rules of the common law, and can have adequate relief only in a court of equity, where matters of this nature are properly cognizable and relievable, to the end that the said defendants may, if they can, show why your orator should not have the relief hereby prayed, and that they may separately and severally answer make (but not under oath, their answer under oath being hereby expressly waived), according to the best of their knowledge, information and belief, to all the matters and charges aforesaid, and as fully in every respect as if the same were here again repeated, and they thereunto particularly interrogated, your orator prays:

First. That a receiver may be appointed in this cause of all and singular the rights, franchises, and property of every name and nature of said defendant Atlantic and Pacific Railroad Company, with power and authority to operate said railroads and to preserve the property of said defendant, and to carry on the business of said railroad company, under the direction of this court, with all the usual powers and duties of receivers in such cases, and

with authority to proceed to recover, by suit or otherwise, all property in the hands of other parties belonging to the said railroad company, and all moneys justly due to it and unlawfully withheld by any person on any pretense whatever, and that an injunction may issue out of this court restraining and enjoining the said railroad company and all and every its agents and servants from, in any way, interfering with the possession or control of the property of said railroad company under the control of said receiver, and from selling, transferring, conveying, leasing or otherwise disposing of or encumbering any of the property, rights or franchises of the said railroad company.

22 Second. That the said Western Division first mortgage, dated July 1, A. D., 1880, may be decreed to be a first lien upon all the property, real, personal and mixed, rights and franchises described in the said mortgage, and then owned or subsequently acquired by said defendant Atlantic and Pacific Railroad Company to secure the payment of said bonds issued thereunder, and the interest and coupons for interest on the said bonds outstanding and unpaid, and the interest thereon, and that an account be taken of the bonds secured by said first mortgage and of the amount due and unpaid on the said bonds and the coupons thereon.

Third. That said defendant Atlantic and Pacific Railroad Company may be decreed to pay all moneys now due or to become due and payable under and by virtue of said first mortgage, and of the bonds issued thereunder and secured thereby, and of the coupons for interest thereon, and that in default thereof said Atlantic and Pacific Railroad Company and all persons claiming under, by or through it, or claiming any interest in said mortgaged premises and property or any part thereof, may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to the said mortgaged premises and every part and parcel thereof, and that all the property of said defendant railroad company, real, personal and mixed, and all the effects, rights, immunities and franchises belonging to it or covered by said mortgage may be sold under the direction of this honorable court in such manner as the court may direct and according to the law and practice of this court, to satisfy the amount found due, and that out of the proceeds of such sale, or the net earnings while in the hands of said receiver, there may be paid first; the costs and expenses of your orator in this suit, including proper attorneys', solicitors' and counsel fees, with

23 a proper compensation to your orator for its own service as trustee, to be allowed by the court, and that the residue thereof may be applied in such proportions and when and as the court shall order and direct, and in due order of priority, to the payment of the said bonds issued under said first mortgage and the coupons for interest thereon, together with interest on said bonds and coupons, and that any deficiency on such sale may be entered in this cause as a judgment against said defendant railroad company.

Fourth. That your orator may have such other and further relief

in the premises as the circumstances of the case may require and may be agreeable to equity.

May it please your honors to grant unto your orator a writ of subpoena issuing out of and under the seal of this honorable court, directed to the defendants Atlantic and Pacific Railroad Company, Atchison, Topeka and Santa Fe Railroad Company, St. Louis and San Francisco Railway Company, Aldace F. Walker, John J. McCook and Joseph C. Wilson, as receivers of the property and franchises of the Atlantic and Pacific Railroad Company; Aldace F. Walker, John J. McCook and Joseph C. Wilson, as receivers of the property and franchises of Atchison, Topeka and Santa Fe Railroad Company; Aldace F. Walker, John J. McCook and Joseph C. Wilson, as receivers of the property and franchises of St. Louis and San Francisco Railway Company; The Mercantile Trust Company and The Boston Safe Deposit and Trust Company, to appear and answer this bill.

And your orator will ever pray, &c.

UNITED STATES TRUST COMPANY
OF NEW YORK,

[SEAL.] By JOHN A. STEWART, *President*.

24 Attest:

H. L. THORNELL, *Secretary*.

EDWARD W. SHELDON,
Complainant's Solicitor.
FREDERICK B. JENNINGS,
Of Counsel.

UNITED STATES OF AMERICA, }
Southern District of New York, } ss:

I, John A. Stewart, being duly sworn, depose and say that I am president of The United States Trust Company of New York, the complainant above named, and have been such president for a number of years past; that I have read the foregoing bill of complaint and know the contents thereof, and that the same is true to the best of my knowledge, information and belief; that this verification is not made by the complainant because it is a corporation; that my knowledge or information are derived from having taken part in some of the transactions spoken of, from statements, made to me, and from examination of the papers, and the same constitute my grounds of belief, and that the seal affixed to said bill of complaint is the corporate seal of said complainant and was so affixed by its authority.

JOHN A. STEWART.

Sworn to before me this 10th day of July, 1895.

HENRY C. KENNEDY,
Notary Public, Kings Co.

[SEAL.]

Cert. filed N. Y. Co.

This indenture, made this first day of July, in the year of our Lord one thousand eight hundred and eighty, by and between the Atlantic and Pacific Railroad Company, a corporation duly organized and existing under the laws of the United States of America, party of the first part, and the United States Trust Company of New York, a corporation duly organized and existing under the laws of — State of New York, party of the second part, witnesseth :

That whereas the party of the first part, under the act of Congress entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July 27, 1866, is authorized to construct, is now constructing, and has partially constructed, and intends to complete, equip and put in operation as rapidly as practicable, that part of said company's authorized line of railroad and telegraph lying between the Rio Grande river and the Pacific ocean, and hereinafter described and referred to as the "Western division ;"

And whereas, the party of the first part has duly executed an agreement under seal, dated January 31, 1880, wherein, among other things, it agreed with the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company to complete said Western division as rapidly as practicable, and that the railroad of the St. Louis and San Francisco Railway Company and the railroad of the Atchison, Topeka and Santa Fe Railroad Company and the Western division of the railroad of the Atlantic and Pacific Railroad Company, and such of their branches and leased lines as may be necessary for the purpose, shall be operated by the respective companies as an uninterrupted, continuous through

line of railroad to and from the Mississippi and Missouri rivers
26 and the Pacific coast for and during the term of thirty (30) years from the first day of July in the present year, and afterwards until the first day of October, A. D. 1910 ; and in consideration thereof said Atchison, Topeka and Santa Fe Railroad Company and said St. Louis and San Francisco Railway Company have executed the contract of guaranty indorsed hereon ;

And whereas, said act of Congress provides as follows :

"SECTION 3. And be it further enacted, That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway and its branches, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad wherever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold,

granted or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof,

27 under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections, and not including the reserved numbers: Provided, that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: Provided, further, that the railroad company receiving the previous grant of land may assign their interest to said Atlantic and Pacific Railroad Company, or may consolidate, confederate and associate said company upon the terms named in the first and seventeenth with sections of this act: Provided, further, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands in odd-numbered sections nearest to the line of said road, and within twenty miles thereof, may be selected as above provided: And provided, further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal: And provided, further, that no money shall be drawn from the Treasury of the United States to aid in the construction of the said Atlantic and Pacific railroad.

"SECTION 4. And be it further enacted, That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior,

28 and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report, under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid."

And whereas, by an act of Congress, entitled "An act to enable

the Atlantic and Pacific Railroad Company to mortgage its road," approved April 20, 1871, it was enacted as follows, to wit:

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled:

"That the Atlantic and Pacific Railroad Company, organized under act of Congress of July 27, 1866, is hereby authorized to make and issue its bonds, in such form and manner, for such sums, payable at such times, and bearing such rate of interest, and to dispose of them on such terms as its directors may deem advisable; and to secure said bonds, the said company may mortgage its road,

29 equipment, lands, franchises, privileges, and other rights and property, subject to such terms, conditions and limitations as its directors may prescribe. As proof and notice of the legal execution and effectual delivery of any mortgage hereafter made by said company, it shall be filed and recorded in the office of the Secretary of the Interior; provided that, if the company shall hereafter suffer any breach of the conditions of the act above referred to, under which it is organized, the rights of those claiming under any mortgage made by the company to the lands granted to it by said act shall extend only to so much thereof as shall be coterminous with or appertain to that part of said road which shall have been constructed at the time of the foreclosure of said mortgage."

And, whereas, the party of the first part, for the purpose of obtaining means to complete the construction and equipment of the "Western division," has resolved to issue and negotiate its first-mortgage bonds to an amount not exceeding twenty-five thousand dollars a mile, to consist of a series of coupon bonds of one thousand dollars each, numbered consecutively from number 1 (one) upwards, and registered bonds of five thousand dollars each, numbered consecutively from number 1 (one) upwards, which bonds bear even date herewith; and said coupon bonds are all of the tenor and form following, namely:

No. —.

UNITED STATES OF AMERICA.

\$1,000.

Atlantic and Pacific Railroad Company, Western division.

First-mortgage Coupon Six per Cent. Gold Bond.

30 Know all men by these presents that the Atlantic and Pacific Railroad Company is indebted & promises to pay to the United States Trust Company of New York, trustee or bearer, one thousand dollars, on the first day of July, A. D. 1910, in gold coin of the United States of America of or equivalent to the present standard of weight and fineness, together with interest thereon at the rate of six per cent. per annum in like gold coin, payable semi-annually on the first days of January and July, according to the tenor of the coupons hereto annexed, and upon presentation thereof as they severally fall due; both principal and interest will be paid at the agency of the railroad company in the city of New York.

It is agreed between the Atlantic and Pacific Railroad Company

and the holder of this bond that no recourse shall be had for its payment to the individual liability, if any, of any stockholder of the company.

This bond is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor; and, without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected, and payment thereof equally secured, by a first mortgage of even date herewith, to the United States Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said trustee, and its successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants, and other property pertaining to said Western division, as set forth in said mortgage and upon the trusts therein declared.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the United States Trust Company of New York, trustee, and used solely:

First. To provide for any deficiency in the net earnings
31 for the payment of interest on the first-mortgage bonds.

Second. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

Third. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

Fourth. For the purchase and cancellation of the first-mortgaged bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment for any or all lands sold by the Atlantic and Pacific Railroad Company under the provisions of said mortgage; and this bond is entitled to the benefit of such provisions.

This bond shall pass by delivery or by transfer upon the books of the Atlantic and Pacific Railroad Company at the option of the holder; and, after a registration of ownership certified hereon by the treasurer or transfer agent of said company, no transfer except upon the books of said company shall be valid, unless the last transfer was made to bearer, thereby restoring transferability by delivery.

This bond is not valid unless authenticated by a certificate indorsed hereon, and signed by the United States Trust Company of New York, trustee, or its successor or successors in said trust.

32 In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and
[SEAL.] these presents to be signed by its president, and attested by its secretary, this first day of July, A. D. 1880,

ATLANTIC AND PACIFIC RAILROAD
COMPANY,

By ———, *President.*

Attest : ———, *Secretary.*

And said registered bonds are of the tenor and form following, namely :

No. —. UNITED STATES OF AMERICA. \$5,000.

Atlantic and Pacific Railroad Company, Western division.

First-mortgage Registered Six per Cent. Gold Bond.

Know all men by these presents that the Atlantic and Pacific Railroad Company is indebted and promises to pay to the United States Trust Company of New York, trustee, or the registered holder hereof, the sum of five thousand dollars, on the first day of July, A. D., 1910, in gold coin of the United States of America of or equivalent to the present standard of weight and fineness, with interest thereon at the rate of six per cent. per annum in like gold coin, payable semi-annually on the first days of January and July; both principal and interest payable at the agency of the railroad company in the city of New York.

33 It is agreed between the Atlantic and Pacific Railroad Company and the holder of this bond that no recourse shall be had for payment thereof to the individual liability, if any, of any stockholder of the company.

This bond is transferable only upon the books of the railroad company, and is one of a series of bonds, coupon and registered, not exceeding in all twenty-five thousand dollars a mile, which bonds are of even date and like tenor, and, without any preference by reason of priority of issue, or of any cause or thing whatsoever, are equally protected and payment thereof equally secured by a first mortgage of even date herewith, to the United States Trust Company of New York, trustee, duly executed and delivered by the Atlantic and Pacific Railroad Company, conveying to said trustee, and its successor or successors in said trust, the franchises, railroad, telegraph, lands, land grants and other property pertaining to said Western division as set forth in said mortgage and upon the trusts therein declared.

It is provided in said mortgage that the net proceeds of the land grant shall be deposited with the United States Trust Company of New York, trustee, and used solely :

First. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds.

Second. To provide for any deficiency in the net earnings for the payment of interest on the second-mortgage bonds.

Third. For the payment of the principal and interest of any advances made by the Atchison, Topeka and Santa Fe Railroad Company and the St. Louis and San Francisco Railway Company
34 to the Atlantic and Pacific Railroad Company under their contract endorsed upon this mortgage.

Fourth. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

And it is also provided that the first-mortgage bonds shall be receivable at par in payment of any or all lands sold by the Atlantic and Pacific Railroad Company under the provisions of said mortgage. And this bond is entitled to the benefit of such provisions.

This bond is not valid unless authenticated by a certificate endorsed hereon, and signed by the United States Trust Company of New York, trustee, or its successor or successors in said trust.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these [SEAL.] presents to be signed by its president, and attested by its secretary, this first day of July, A. D. 1880.

ATLANTIC AND PACIFIC RAIL-
ROAD COMPANY,

By ———, *President.*

Attest: ———, *Secretary.*

And whereas, the following certificate is to be endorsed upon each of said coupon and registered bonds, namely:

The within bond is one of a series issued by the Atlantic and Pacific Railroad Company, and described in a first mortgage of even date herewith, executed by said railroad company to the
35 United States Trust Company of New York, as trustee, upon the franchises, railroad, telegraph, lands, land grants, and other property pertaining to the Western division of said railroad company, as set forth in said mortgage; and this bond is entitled to the benefit of the agreement of the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, endorsed upon said mortgage.

—————, *Trustee.*

And whereas, the party of the first part, being about to issue some of said bonds and intending to issue the remainder from time to time as it may deem expedient, for the purposes aforesaid, desires to secure the principal and interest of all the said bonds by a mortgage of the franchises and properties hereinafter described to the party of the second part, as trustee, for the equal benefit of all the persons and corporations who may become the holders of any of said bonds, without any preference by reason of priority of issue, or any other cause or thing whatsoever, and the party of the second part has signified its willingness to accept said trust:

Now, therefore, the party of the first part, in consideration of the premises, and of one dollar to it in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, and in order to secure the payment of the principal and interest of all said first-mortgage bonds, both coupon and registered, according to the tenor thereof, does, by these presents, grant, bargain, sell, transfer, assign and convey to the party of the second part, trustee as herein-after set forth, its successor or successors in said trust, and assigns forever, the franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts,

36 rolling stock, tools, machinery, supplies, and all property of every description now and hereafter composing and pertaining to that part of the railroad and telegraph line of the party of the first part known as the Western division, beginning at Albuquerque on the Rio Grande river, in the Territory of New Mexico, and thence running by way of the Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude as near as may be found most suitable for a railway route to the Colorado river, at such a point as may be selected by the party of the first part for crossing, and thence by the most practicable and eligible route to the Pacific ocean, or however otherwise said Western division may be located or described; and also all additions and extensions which the party of the first part may make to said railroad and telegraph and the other property and things aforesaid, together with all the rents, tolls, issues, profits, income, privileges and appurtenances thereunto belonging or in anywise appertaining, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and in equity, of the party of the first part, of, in and to the same, and any and every part thereof, with appurtenances:

To have and to hold the same to the party of the second part, trustee as aforesaid, its successor or successors in said trust, and their assigns, in trust for the benefit and security of any and all persons and corporations who shall be or become holders of any of said first-mortgage bonds, without preference by reason of priority of issue, or of any cause or thing whatsoever, upon the trusts, conditions, and agreements, and to and for the uses and purposes hereinafter expressed, namely:

Article 1. The party of the first part hereby agrees to pay all taxes and assessments upon the granted premises, and not to suffer any lien or attachment superior to the lien created by these
37 presents to be enforced thereon, and not to commit or suffer any waste thereof.

Article 2. The proceeds of said first-mortgage bonds from time to time issued and negotiated shall be deposited, one-half with the United States Trust Company of New York, and one-half with the Boston Safe Deposit and Trust Company of Boston, or, in whole or in part, with such other trust companies as the directors of the party of the first part may designate, and the party of the second part, its successor or successors in said trust, approved, to the credit of the party of the first part, and shall be used for the purpose of constructing, equipping, maintaining and operating said Western division of the Atlantic and Pacific Railroad Company and for the payment of the interest maturing on such bonds until the completion of said division to the Pacific coast, or until such party of the second party shall, by a contract with any other road, form a through line, properly equipped to the Pacific coast, and for one year thereafter. The party of the first part agrees to complete said Western division or form such through line, as aforesaid, with due and reasonable diligence; to furnish to the party of the second part during construc-

tion, monthly accounts, showing the application of said proceeds, and to permit, at any and all reasonable times, an inspection of its books and vouchers by the party of the second part, its agents or attorneys.

But the party of the second part and the holder of said bonds shall not be obliged to make any inquiry in respect to, or be in any manner answerable for, the application or misapplication of said proceeds.

Article 3. The party of the first part shall, at its discretion from time to time sell the lands received from the United States
38 under said first-named act of Congress, and any and all acts subsequent thereto, to aid in the construction of said railroad and telegraph, and included in this mortgage, at just and reasonable prices, either wholly for cash or partly upon credit, secured by a lien upon the land sold, and the party of the second part, its successor or successors in said trust, shall upon demand from time to time release the lands thus sold to the party of the first part, or to the purchaser thereof, as may be deemed most advisable; provided, however, that the appointment of the land commissioner shall be made by the party of the first part with the approval of the party of the second part, which approval shall be inferred if no objection is made within thirty days after notice of the intended appointment; that the party of the first part may remove said commissioner at any time, and shall remove him upon request of the party of the second part for cause shown; that said commissioner shall certify, upon request of the party of the second part, that the prices at which any and all said lands are sold from time to time are just and reasonable, and such certificate shall, for the protection of the party of the second part, be sufficient evidence of the facts therein stated. And provided also that the net cash proceeds of said lands shall be deposited with, and all notes and securities taken therefor shall be held subject to the control of the United States Trust Company of New York, trustee, or its successor or successors in said trust, and used solely—

First. To provide for any deficiency in the net earnings for the payment of interest on the first-mortgage bonds; and

39 Second. To provide for any deficiency in the net earnings for the payment of interest on the second mortgage bonds.

Third. For the payment of the principal and interest of any advances, made by the Atchison, Topeka and Santa Fe Railroad Company, and the St. Louis and San Francisco Railway Company, to the Atlantic and Pacific Railroad Company, under their contract indorsed upon this mortgage.

Fourth. For the purchase and cancellation of the first-mortgage bonds, whenever they can be obtained by public advertisement, at not exceeding one hundred and ten per cent. and interest.

Provided, however, that the bonds hereby secured may be received at par and accrued interest in payment for any and all of said lands, and when so received shall be forthwith cancelled. And the party of the second part shall also release upon demand, from time to time, to the party of the first part, its successors or assigns, other

lands, buildings or property of any kind included in this mortgage which may be sold or exchanged without impairing the efficiency of the said railroad and telegraph; provided, however, that in case of sale the net proceeds thereof be paid to the party of the second part, its successor or successors in said trust, and applied as above, or used by the party of the first part to replace the property sold, and that the party of the first part shall, upon demand, from time to time execute such deeds or mortgages as may be necessary to extend the lien created by these presents to the new property thus acquired by purchase or exchange.

Article 4. Until default, as hereinafter described, in the principal or interest of said first-mortgage bonds, or of any of the agreements and conditions herein declared to be kept and performed by the party of the first part, said party shall possess, operate, maintain and enjoy the railroad and telegraph composing said Western division, and all the franchises, rights and property of every kind with the appurtenances included in this mortgage, and collect, receive and use the rents, tolls, issues, income and profits thereof.

Article 5. If there shall be any default in the payment of the interest of the bonds hereby secured or in any of the agreements or conditions to be kept and performed by the party of the first part, and such default continues during six consecutive months, or if there shall be any default in the payment of the principal of said bonds, then and at any time thereafter during the continuance of such default, and for the purpose of foreclosing this mortgage, the party of the second part, its successor or successors in said trust, may personally or by its, his or their attorney or agent, enter upon, take, possess, maintain, and operate said railroad and telegraph and all franchises, property and appurtenances of every description belonging or pertaining to said Western division, and make any necessary alterations in and additions thereto, and collect and receive the rents, tolls, issues, income and profits thereof, and shall sell and dispose of said lands and land grants; and, after paying all taxes, assessments and liens superior to the lien created by these presents, and all proper expenses of construction, operating and maintaining said railroad and telegraph, and of selling and disposing of said lands and land grants, including the compensation of said trustee, shall apply the remainder as follows, namely:

First. To the payment of interest on said first-mortgage bonds.

Second. To the payment of the principal of said bonds, if the same is then due, or if the holders of one-third in amount of said bonds outstanding shall elect that the same shall then be considered due; but, in case said principal is due, or elected to be considered due the said remainder shall be applied to payment of interest and principal without preference.

Third. If said principal is not due or elected to be considered due as aforesaid, then the net proceeds of the land grant shall be applied as provided in article 3, and the net proceeds of the railroad and telegraph, after payment of interest on all bonds in the order of preference, and of all other interest-bearing

indebtedness pertaining to said Western division, shall be applied to a sinking fund for the purchase and cancellation of the said first-mortgage bonds at not exceeding par and accrued interest, and for the ultimate payment of said last-named bonds. And, if the earnings of said railroad and telegraph, after payment of expenses of operating and maintaining the same, and all proper charges, are sufficient to pay the interest on the bonds hereby secured, as the same falls due, and all arrearages of interest on said bonds have been fully paid, the trustee or trustees having said possession as aforesaid, shall surrender and restore the railroad and telegraph with all the rights, franchises and property of every kind pertaining to said Western division, and all additions thereto and extensions thereof, and, reserving all funds which should be retained and applied under article 3, shall deliver up all moneys, bills, accounts, claims and demands of every name and nature pertaining to said Western division, and all branches thereof, to the party of the first part, its successors or assigns, who shall possess and enjoy the same, subject, however, to the provisions of this mortgage; provided, however, that any default may be waived by the written assent thereto of a majority in interest of the bonds outstanding; but waiver of any previous default shall not affect the rights of the parties upon any default subsequently happening. And the provisions of both articles 5 and 6 are subject to this proviso.

Article 6. If there shall be any such default as described 42 in article 5, and the same is not waived as provided in the same article, then, and at any time thereafter during the continuance of such default, the party of the second part, its successor or successors in said trust, may, and upon demand of the holders of one-fourth in amount of said first-mortgage bonds outstanding, with indemnity for expenses liable to be incurred, shall, with or without entry, sell the said franchises, rights of way, railroad, telegraph, lands, land grants, shops, depots, buildings, structures, bridges, viaducts, rolling stock, tools, machinery, supplies and all property of every description then composing and pertaining to said Western division, at public auction, free and discharged from all said trusts, first publishing notice of the time and place of said sale in one or more daily newspapers in each of the cities of Boston, New York, St. Louis, Chicago and San Francisco, not less than three times a week for six consecutive weeks next preceding the time appointed, and shall execute and deliver to the purchaser or purchasers at such sale and good and sufficient deed or deeds in the law for the same in fee-simple; which sale and conveyance made as aforesaid, shall be a perpetual bar at law and in equity to the party of the first part, and all persons claiming through, by or under the said party. The party of the second part, its successor or successors in said trust, may purchase at said sale; and no other purchaser shall be liable for the application or misapplication of the purchase-money, or be under any obligation to inquire into the necessity, expediency or authority for any such sale. And the net proceeds of such sale, after deducting all proper charges and expenses, shall be applied without preference to the payment of the principal and interest of the first-mort-

43 gage bonds hereby secured; and any surplus then remaining shall be paid to the party of the first part, its successors or assigns, or to such person or corporation as may be lawfully entitled to receive the same.

Article 7. If the party of the first part shall pay the principal and interest of all the first-mortgage bonds secured hereby which may be issued, according to the tenor thereof, this mortgage and all of said bonds shall be void, but otherwise of full effect and virtue.

Article 8. The party of the first part, its successors and assigns, shall, from time to time, and at all times hereafter, and as often as thereunto requested by the party of the second part, its successor or successors in said trust, execute, acknowledge and deliver all such further deeds, conveyances and assurances in the law for the better assuring unto said trustee, and its successor or successors in the trust hereby created, upon the trusts herein expressed, the lands, land grants, railroad, telegraph equipments and appurtenances hereinbefore mentioned, or intended so to be, now and hereafter composing or pertaining to said Western division, and all additions thereto and extensions thereof, as by the said trustee, its successor or successors in said trust, or by its, his or their counsel learned in the law, shall be reasonably advised or required.

Article 9. The present or any future trustee may resign upon three months' notice in writing to the party of the first part, its successors or assigns, and to the holders of record of the bonds hereby secured, and may be removed at any time by a vote of a majority in interest of the holders of all said bonds outstanding at a meeting of the bondholders, attested by a written statement of such vote signed by the persons so voting, and may be removed at any time by the party of the first part, its successors or assigns, with
44 the written assent of the holders of one-fourth in amount of all said bonds outstanding; and any vacancy in the trusteeship hereby created, occasioned by the dissolution, death, resignation, removal, incapacity or refusal to act of the present or any succeeding trustee, may be filled by appointment made by the party of the first part, its successors or assigns, with the approval of the majority in interest of the bondholders present or represented by proxy at a meeting held for that purpose, and such action may be had in anticipation of and before the actual happening of a vacancy. And, if the vacancy is not filled as aforesaid before the expiration of thirty days after the same has occurred, any justice of the Supreme Court of the United States may, upon the application of the party of the first part, its successors or assigns, or of any holder or holders of the first-mortgage bonds hereby secured, to the amount at par of one million dollars, or a less amount, if so many are not outstanding, appoint one or more persons or corporations to fill said vacancy.

And the act of appointment made in any of the ways aforesaid, and the acceptance on the part of the appointee, shall vest in such appointee all the estates, rights, titles, properties, interests and powers before vested in his or its predecessor under this mortgage, and upon the trusts, agreements and conditions, and to and

for the uses and purposes therein declared. Nevertheless, the present and any and all future trustees hereunder, by the acceptance of said trust, severally covenant and agree for themselves, their successors and administrators respectively, that they will execute, acknowledge and deliver, each to his or its respective successor or successors in said trust, from time to time, and at all times as
 45 often as requested thereunto by the party of the first part, its successors and assigns, or by the holders of said bonds to the amount of one million dollars, or a less amount if so many are not outstanding, such deeds, conveyances and assurances in the law for the better assuring to such successor or successors the said estates, rights, titles, properties, interests and powers as counsel learned in the law may reasonably advise or require. Meetings of the bondholders may be called by either of the parties hereto, or by holders of said bonds amounting at par to one million dollars, or a less amount if so many are not outstanding, or by any committee chosen at a previous meeting, by publishing notice of the time and place of meeting in one or more newspapers in the cities of Boston, New York, St. Louis and San Francisco, twice each week for six successive weeks prior to the time of said meeting. And, in all meetings of bondholders, holders of record, and persons exhibiting proof satisfactory to said meeting that they are *bona fide* holders of said bonds, shall be entitled in person, or by attorney, to vote in proportion to the amounts held by them.

Article 10. The present trustee, its successor or successors in said trust, may, in case of necessity, employ agents, attorneys or servants in the discharge of said trust, and the just and reasonable charges of said trustee and its agents, attorneys and servants shall be paid by the party of the first part. The present trustee, its successor and successors in said trust, shall not be liable for any error of judgment or mistake of fact made by it or any of them in good faith, and shall not be liable for any error of judgment or mistake of fact, or for any act or thing whatsoever done, suffered or neglected by its or their agents, attorneys, servants or employes selected in good
 46 faith in the discharge of said trusts. And, if at any time there shall be two or more trustees joined in the said trusts, neither shall be in any manner answerable for the acts of the other.

In witness whereof, the Atlantic and Pacific Railroad Company has caused its corporate seal to be affixed hereto, and these
 [SEAL.] presents to be signed by its president, and attested by its secretary; and the United States Trust Company of New York, in token of its acceptance of the foregoing trusts, has caused its corporate seal to be affixed hereto, and these presents to be signed by its president, and attested by its secretary, the day and year first above written.

ATLANTIC AND PACIFIC RAIL-
ROAD COMPANY,

By THOMAS NICKERSON, *President*.

Attest: S. W. REYNOLDS, *Secretary*.

UNITED STATES TRUST COM-
PANY OF NEW YORK,

By JOHN A. STEWART, *President*.

[SEAL.]
Attest: J. S. CLARK, *Secretary*.

COMMONWEALTH OF MASSACHUSETTS, }
Suffolk, } ss :

On this third day of August, A. D. 1880, before me, Levi C. Wade, a notary public in and for said county of Suffolk, personally appeared Thomas Nickerson and S. W. Reynolds, known to me to be, respectively, in the order named, president and secretary of the above-named Atlantic and Pacific Railroad Company, and made oath that they are respectively such president and secretary; that, by order of the board of directors of said company, they signed, attested and sealed with said company's seal the foregoing instrument as above appears, and acknowledged the same to be the free act and deed of said company.

[NOTARIAL SEAL.]

LEVI C. WADE.

STATE OF NEW YORK, }
City and County of New York, } ss :

On this ninth day of August, A. D. 1880, before me came John A. Stewart, with whom I am personally acquainted, who, being by me duly sworn, says that he resides in said city; that he is the president of the United States Trust Company of New York; that he knows the corporate seal of said corporation, and that the seal which is affixed to the foregoing instrument is the corporate seal of the said corporation, and was affixed thereto by authority of the board of trustees of said corporation; and that he signed the same as president of said corporation by the like authority.

[NOTARIAL SEAL.]

HENRY L. THORNELL,
Notary Public, New York Co.

EXHIBIT B.

Whereas, the St. Louis and San Francisco Railway Company, the Atlantic and Pacific Railroad Company, and the Atchison, Topeka and Santa Fe Railroad Company duly executed an agreement under seal, dated January 31, 1880, wherein among other things, they agreed that the railroad of the St. Louis and San Francisco Railway Company, and the railroad of the Atchison, Topeka and Santa Fe Railroad Company, and the Western division of the railroad of the Atlantic and Pacific Railroad Company, and such of their branches and leased lines as may be necessary for the purpose, shall be operated by the respective companies as an uninterrupted, continuous, through line of railroad to and from the Mississippi and Missouri rivers and the Pacific coast, for and during the term of thirty (30) years, from the first day of July in the present year, and afterwards until the first day of October, A. D. 1910:

Now, therefore, in consideration of said agreement, and of one dollar to us in hand paid, the receipt of which is hereby acknowledged, the St. Louis and San Francisco Railway Company, and the Atchison, Topeka and Santa Fe Railroad Company, do severally

covenant and agree with the Atlantic and Pacific Railroad Company and the United States Trust Company of New York, trustee in the within mortgage for the benefit of the holder of the first-mortgage bonds secured thereby, that, if at any time after twelve months following the completion of the Western division of the said company in the within mortgage mentioned, or after twelve months after the Atlantic and Pacific Railroad Company shall, by a contract with any other road, have formed a through line to the Pacific coast, its earnings should prove insufficient to pay all coupons on said bonds as they mature, they will contribute, ratably, to the earnings, hereinafter described, for the purpose of paying and cancelling the same from their respective earnings upon all business received from and delivered to said Western division, by and from their lines of road

as above set forth, such sum as may be necessary to make up the deficiency of the earnings of the said Atlantic and Pacific Railroad Company, and the amount required to pay such coupons, but not exceeding twenty-five per cent. (25 per cent.) of the gross amount of their said described earnings respectively during the six months, ending on the first days of October and April, preceding the due date of such coupons.

In witness whereof, the said St. Louis and San Francisco Railway Company and the Atchison, Topeka and Santa Fe Railroad Company have severally caused their corporate seals to be attached hereto, and these presents to be signed by their respective presidents and attested by the secretary of the first-named and the assistant secretary of the last-named company on this first day of July, A. D. 1880.

ST. LOUIS AND SAN FRANCISCO RAIL-
WAY COMPANY,

[SEAL.] By E. F. WINSLOW, *President*.

Attest:

C. LITTLEFIELD, *Secretary*.

ATCHISON, TOPEKA AND SANTA FE
RAILROAD COMPANY,

[SEAL.] By T. JEFFERSON COOLIDGE, *President*.

Attest:

GEO. L. GOODWIN,
Assistant Secretary.

50 And thereafter and on, to wit: the 10th day of January, 1896, there was an order duly made and entered of record in the said cause appointing a receiver of the property and franchises of the Atlantic and Pacific Railroad Company, which said order is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO :

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY, of New York, Com- plainant,	} No. 1122.
<i>vs.</i>	
THE ATLANTIC AND PACIFIC RAILROAD COMPANY <i>et al.</i> , Defendants.	

Order Appointing Receiver.

Now on this 10th day of January, A. D. 1896, comes the complainant, The United States Trust Company of New York, by Neill B. Field, one of its solicitors; and also come the defendants, except the defendant, The Boston Safe Deposit and Trust Company, by their respective solicitors, and thereupon, upon the record in this cause, comes on for hearing the application of The United States Trust Company of New York for the appointment of a receiver herein, which application is consented to by the defendants, The Atlantic and Pacific Railroad Company, The Atchison, Topeka and Santa Fe Railroad Company, The St. Louis and San Francisco Railway Company, and the receivers of the property and franchises of said three last-named corporations, The Mercantile Trust Company, defendant herein, not consenting, and the same having been heard by the court, and the court being now fully advised in the premises—

It is now hereby ordered, adjudged and decreed, that Charles W. Smith be and he hereby is appointed receiver of all and singular the lands, tenements and hereditaments of the said Atlantic and Pacific Railroad Company covered by the mortgage sought to be foreclosed herein, and also all personal estate thereof, including all its railroad tracks, rights of way, sidings, structures, depot grounds, station-houses, engine-houses, car-houses, freight-houses, wood-houses, sheds, watering places, workshops, machine shops, bridges, viaducts, culverts, fences and fixtures, together with its leases, rights under lease, rents from hired lands or hired railroads, and all its locomotives, tenders, cars, carriages, coaches, trucks, and other rolling stock, its machinery, tools, scales, turn-tables, rails, wood, coal, oil, fuel, equipment, furniture and material of every name, nature and description; and all its stocks, bonds and obligations, choses in action, accounts and rights under contracts now owned or possessed by the said defendant railroad company, covered by the mortgage sought to be foreclosed herein, together with the corporate rights, immunities and franchises, and all of the tools, fares, freights, rents, income and profits covered by said mortgage; and that the said receiver be and he is hereby authorized and directed to take possession of all and singular the railroads and properties above described, or above referred to, wherever situated or found, and to continue the opera-

52 tion of the said railroad, and every part or portion thereof, and to run, manage and operate the said railroad, and every part or portion thereof, and such other railroads as the said defendant railroad company owns or holds, controls or operates under lease, contract, arrangement or otherwise, as heretofore run and operated, or which have been, or are being operated by, for or in the interest of the said Atlantic and Pacific Railroad Company, and to conduct the business and occupation of a common carrier of passengers and freight; and to discharge all public and governmental duties obligatory upon said corporation or upon any other corporation whose lines of road are now in the possession of or operated by the said Atlantic and Pacific Railroad Company, and to preserve the said property in proper condition, and repair the same so that it may be safely and advantageously used, and to protect the same, and to employ such persons and make such payments and disbursements as may be needful and proper in so doing.

It is further ordered, That the said receiver, within the next thirty days, file with the clerk of the court a proper bond with sureties, to be approved by the judge of this court, in the penal sum of fifty thousand dollars, conditioned for the faithful discharge of his duties, and to account for all funds given into his hands according to the orders of this court.

Each and every of the officers, attorneys, agents or employes of the said Atlantic and Pacific Railroad Company, and all other persons or corporations are hereby required to turn over and deliver to such receiver, or his duly constituted representatives, any and all railroad property, books of account, vouchers, deeds, leases, contracts, bills, notes, accounts, moneys, stocks, bonds or obligations, or other property in his or their hands and in his or their control; and each and every of such attorneys, officers, agents, employes, persons or corporations are hereby required and commanded to obey and conform to such orders as may be given them from time to time by such receiver, or his duly constituted representatives, in conducting the operations of such property, and in discharge of his
53 duties as such receiver.

And it is further ordered, adjudged and decreed, that the said defendant, its agents, officers and servants, and all other persons be, and the same are hereby restrained and enjoined during the pendency of this action from interfering with, transferring, selling, or disposing of any of the property of the said defendant railroad company, or from taking possession of or in any manner whatever interfering with the same or any part thereof, or from interfering in any manner whatever with the possession or management of any of said property over which the receiver is hereby appointed or from interfering in any manner to prevent the discharge of his duties or from the operation of the said property under the order of this court.

And the said receiver is hereby fully authorized to operate the said Atlantic and Pacific railroad and to manage the property of the said corporation in such manner as will in his judgment produce the most satisfactory results, consistent with the discharge of

the public duties imposed thereon; and to collect and receive all of the income therefrom, and all of the debts due the said company of all kinds, and for such purpose is hereby vested with the full power in his discretion to employ and discharge, and to fix the compensation of such officers, agents, attorneys, managers, superintendents and employes as are necessary to aid in the discharge of his duties, except that the said receiver shall continue in service all the officers and employes of the receivers heretofore appointed by this court in the case of *The Mercantile Trust Company vs. The Atlantic and Pacific Railroad Company et al.*, numbered 999 on the calendar of this court, in the respective positions they occupy, for at least one month after qualification and entrance upon duty by said receiver, provided that for special cause, approved by the court, any or either of said officers or employes may be sooner removed or discharged; and provided further, that this exception shall not prevent discharge or dismissal from service, of any officer or employe for neglect of duty or disobedience of orders or regulations given or prescribed; and he shall have power, with the sanction of the court, to redeem any and all of the securities of the company now pledged as securities on loans of money.

The said receiver is fully authorized and empowered to institute and prosecute such suits that may be necessary in his judgment for the proper protection of the property and trusts hereby vested in him, and to likewise defend all such actions instituted against him as such receiver, and also to come in and aid in the prosecution and defense of any of the suits now pending against the Atlantic and Pacific Railroad Company, the prosecution or defense of which will in his judgment be necessary for the proper protection of the property placed in his charge.

It is further ordered, adjudged and decreed, that out of the moneys that shall come into his hands, as such receiver, from the operation of the said railroad properties, or otherwise, he shall:

First. Pay all current expenses incident to the creation and administration of this trust and to the operation of the said railways or railroads and properties.

Second. Pay all sums due or to become due connecting or intersecting lines of railways, arising from the interchange of business and for track service of other railroads used by said defendant in the operation of its lines and traffic, and car-mileage balances and all amounts now due from the defendant on its road or properties, constituting part of the said system, for taxes and assessments upon the property, or any part thereof.

Third. To pay all sums which are now due and have accrued since the first day of July, 1893, for material or supplies used in the operation or maintenance of said defendant railroad company; and also all sums or amounts due for wages to officers, agents or employes of the defendant railroad company accruing since the first day of July, 1893.

Fourth. To pay all liabilities or damages which may have been or shall be incurred by any person or corporation who may have become sureties of the said defendant company on stay, supersedeas

or cost bonds, or upon any garnishment proceedings, or bonds of other like character without regard to the date of said bonds.

It is further ordered, adjudged and decreed, that the appointment of the said Charles W. Smith as such receiver, and the powers by this order conferred upon him, shall be and become operative, in force and vested from the first day of February, A. D. 1896; that the transfer of the property from the receiver in the Mercantile Trust Company case to the receiver hereby appointed, is made upon the express condition to which the United States Trust Company of New York expressly assents, that this court may in this case, before all priorities and allowances which it could have enforced in the said Mercantile Trust Company case if there had been no change in the receivership.

N. C. COLLIER,
*Associate Justice of the Supreme Court of the
Territory of New Mexico, and Judge of the
Second Judicial District Court Thereof.*

And thereafter and on, to wit: the 12th day of March, 1896, there was filed in the office of the clerk of the said court the intervening petition of the Territory of New Mexico for an order on the
56 receiver in the said cause to pay taxes, which said intervening petition is in the words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

THE UNITED STATES TRUST COMPANY OF NEW YORK,	}	No. 1122.
Complainant,		
vs.		
ATLANTIC AND PACIFIC RAILROAD COMPANY <i>et al.</i> , De-		
fendants.		

Petition of the Territory of New Mexico for an order requiring the receiver of the Atlantic and Pacific Railroad Company to pay the taxes levied upon the property of said company in said county for the year 1895.

To the Honorable Needham C. Collier, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof.

Your petitioner, The Territory of New Mexico, respectfully represents unto your honor:

That in a certain action commenced in said court on the 4th day of January, 1894, and still pending therein, wherein The Mercantile Trust Company of New York is complainant and The Atlantic and Pacific Railroad Company and The United States Trust Company of New York are the defendants, J. W. Reinhart, John J. McCook, and Joseph C. Wilson were duly and legally appointed receivers of

the property of said Atlantic and Pacific Railroad Company, and were at the time provided by law when returns of property for the purposes of taxation were required to be made to the assessor of said county in the year 1894, the duly appointed, qualified, and acting receivers of the property of said company.

That, afterward, the said J. W. Reinhart having resigned as such receiver, Aldace F. Walker was appointed receiver in his place, and at the time provided by law for the making of said returns in the year 1895, the said Aldace F. Walker, John J. McCook and Joseph C. Wilson were the duly appointed, qualified and acting receivers of the property of said Atlantic and Pacific Railroad Company.

That the said Atlantic and Pacific Railroad Company at the time required by law in the year 1893, and the said receivers of the property of said railroad company in the years 1894 and 1895, duly made returns to the assessor of said county of Bernalillo, of all property which said company and said receivers admitted to be subject to taxation in said county for said years, respectfully, copies of which said returns are hereunto attached and made a part of this petition, marked Exhibits "A," "B," and "C."

That at the proper time, the assessor of said county of Bernalillo made an assessment upon the property of said railroad company in said county and entered the same upon the assessment-roll of said county for the year 1895; and as your petitioner is informed and believes, and so charges the fact to be, in compliance with instructions received from the board of county commissioners of said county, included in said assessment and entered upon said assessment-roll, in addition to the property so as aforesaid returned by said receivers for said year, an assessment of which the following is a true copy :

58

Additional Assessment.

The improvements, cross-ties, fish-bar plates, bolts, bridges, culverts and structures, together with the telegraph line erected upon and constructed over the right of way of the said railroad company, commencing at a point where the said road connects with the railroad of the Atchison, Topeka and Santa Fe Company, at the A. & P. Junction, thence in a westerly direction four miles and three thousand seven hundred and eighty feet to a point where the said railroad crosses the line of Valencia county, at \$6,500 per mile..... \$30,550

Also the improvements, cross-ties, fish-bar plates, bolts, bridges, culverts and structures, together with the telegraph line erected upon and constructed over the right of way of the said railroad company, commencing at a point where the said road crosses the line of Valencia county and re-enters the county of Bernalillo, at station 5,247, sixty-eight miles and fifty-four feet to the west line of the said county of Bernalillo, also the west line of the Territory of New Mexico, at \$6,500 per mile... 445.315

Station-houses, shops, depots, switches, water tanks and improvements at Albuquerque.....	30,000
Same, A. & P. Junction.....	1,690
Same, Chaves or Mitchell.....	1,233
Same, Coolidge.....	10,308
Same, Wingate.....	3,196
Same, Gallup.....	15,565
Same, Manuelito.....	2,103

And said assessor carried out the value of said improvements upon said assessment-roll for said year, at the sum of \$539,950, to which he added twenty-five per cent. as a penalty for failure to make a return of said property, making the total assessed value of the property of said company in said county for said year, including that returned as aforesaid by the receivers thereof, and not including its land grant, the sum of \$1,205,897.00.

And that said assessor did also, as your petitioner is informed and believes and so charges, the fact to be, in pursuance of instructions received from said board of county commissioners, as aforesaid, place upon the assessment-roll of said county for the year 1895, the above-described property for the years 1893 and 1894, marking the same "Additional assessment for the year 1893." The following was omitted from the return made by the A. & P. R. R. for the year 1893," and "Additional assessment for the year 1894." The following was omitted from the return made by the A. & P. R. R. for the year of 1894," respectively, and carried out the value of said property for each of said years upon said assessment-roll, at \$539,950.00, to which he added as a penalty for failure to make return of said property for each of said years, twenty-five per cent. making the total assessed value of said property for each of said years, the sum of \$674,937.00.

That the taxing authorities of said county thereafter levied the taxes upon said assessments as contained in said assessment-roll, and said taxes were duly entered upon said assessment-roll, and tax-list opposite the said assessments as follows:

Opposite the assessment for the year 1895....	\$30,311 74
" " " " 1893.....	15,688 36
" " " " 1894.....	15,688 36

Making the total tax on said tax-roll against said company, \$61,688.46. And that one-half of said taxes, to wit, the sum of \$30,844.23 became delinquent by virtue of the statute in such case made and provided, on the first day of January, 1895, and that no part of said taxes has been paid to your petitioner.

Your petitioner further shows unto your honor that at the time required by law, the said tax-roll for the county of Bernalillo aforesaid, duly certified as required by law, was placed in the hands of Alejandro Sandoval, the duly qualified and elected collector of taxes and licenses in and for said county of Bernalillo in the Territory of New Mexico, and the said Alejandro Sandoval as such collector, thereby became charged with the duty of collecting from the

said railroad company or its receivers, the taxes so levied and assessed against it, and your petitioner charges the fact to be, that the levy and assessment of the said taxes created a lien upon all the property of the said defendant, Atlantic and Pacific Railroad Company, within the county of Bernalillo aforesaid, prior and superior to all other liens and encumbrances; which lien it would be the duty of said Alejandro Sandoval as such collector, to enforce by the seizure of the property of said defendant, Atlantic and Pacific Railroad Company, and sale thereof, or a sufficient amount thereof to satisfy the said taxes, together with interest and penalties which have accrued thereon; were it not for the reason hereinafter stated.

Your petitioner further shows unto your honor that at the time the first half of the said taxes became delinquent, to wit, on January first, 1896, the property of said defendant Atlantic and Pacific Railroad Company was in the hands and under the control of Aldace F. Walker and John J. McCook, the receivers theretofore duly appointed by this honorable court in the action of The Mercantile Trust Company of New York, complainant, against Atlantic and Pacific Railroad Company and The United States Trust Company of New York, defendants, as aforesaid, and that by an order of said court made in said cause on the tenth day of January, 1896, Charles W. Smith was appointed receiver of said property in place of the said Walker and McCook, and by virtue of said order took possession of said property on the first day of February, 1896, and since said date has been the duly appointed, qualified and acting receiver of said property; and by an order made in this cause on said tenth day of January, 1896, the said Charles W. Smith was likewise appointed a receiver of said property, and took charge and control thereof on said first day of February, 1896, by virtue of said order, and ever since said date has controlled and operated and now controls and operates the same, as such receiver under the orders of this honorable court.

Your petitioner further shows unto your honor that by reason of the appointment of said receivers in the said suit of the Mercantile Trust Company of New York against Atlantic and Pacific Railroad Company and the United States Trust Company of New York, and the subsequent appointment of said Charles W. Smith as receiver in that action and in this proceeding, as aforesaid, said Alejandro Sandoval as such collector was and is prevented from proceeding in the manner prescribed by law to enforce the collection of the said taxes so levied against the said defendant, Atlantic and Pacific Railroad Company as aforesaid; but your petitioner is likewise advised that it is the duty of said receiver to pay the said taxes out of any moneys in his hands belonging to the said defendant; but, nevertheless, the said receiver denies his liability to pay the said
62 taxes so levied and assessed as aforesaid, and has refused and still refuses to pay the same, although thereunto requested by your petitioner.

Your petitioner further shows unto your honor that it is impracticable to file with this petition a copy of the tax-roll of the county of Bernalillo for said year 1895, but your petitioner files herewith

extracts therefrom showing the levy and assessment of said taxes against said Atlantic and Pacific Railroad Company marked Exhibits "D," "E," and "F," and now here offers to produce when and where this honorable court shall direct, the original tax-roll of said county for said year, for the inspection of the said receiver, if thereunto required.

Your petitioner shows unto your honor that it is the manifest duty of the said receiver to pay the said taxes so levied and assessed, as they appear upon the said tax-roll; but, inasmuch as the said receiver refuses to pay the same, your petitioner is without remedy except in this proceeding.

Wherefore your petitioner prays that the said receiver may be ordered to pay all unpaid taxes levied and assessed against the Atlantic and Pacific Railroad Company as they appear upon said tax-roll of said county of Bernalillo for the year 1895, and that your petitioner may have such other and further relief in the premises as equity may require and to your honor may seem meet.

THOS. N. WILKERSON,

*District Attorney for the Second Judicial District,
Territory of New Mexico, Composed of the Counties of
Bernalillo and Valencia, Solicitor for Petitioner.*

TERRITORY OF NEW MEXICO, { ss:
County of Bernalillo, }

63 Jose Perea, being first duly sworn, upon his oath deposes and says: That he is the duly qualified deputy collector for the county of Bernalillo, New Mexico; that he has read the foregoing petition and knows the contents thereof, and that the allegations therein contained are true of his own knowledge, except as to so much and such parts thereof as are made upon information and belief, and as to those allegations he believes them to be true.

J. L. PEREA.

Subscribed and sworn to before me, this 12th day of March, 1896.

[SEAL.]

THOS. N. WILKERSON,

Notary Public.

EXHIBIT A.

List of Personal Property

Belonging to, claimed by or in the possession or under the control of the Atlantic and Pacific Railroad Company (Western division), a corporation created by act of Congress, having its principal place of business at Albuquerque, New Mexico, the line of its road passing through the counties of Bernalillo and Valencia, in said Territory of New Mexico, and thence through the counties of Apache, Coconino, Yavapai, and Mohave, in the Territory of Arizona, to the eastern boundary line of the State of California; thence through the counties of San Bernardino and Kern, in said State, to the western end of said line and its terminus at Mohave in said county of Kern, a total distance of 802.8 miles; the total mileage of said line owned by said company in said Territory of New Mexico being 166.6 miles,

of which 73.142 miles are in Bernalillo county and 93.458 miles are in Valencia county.

And the said company makes a full report of all its personal property, to wit:

64 *Personal Property Owned by the Atlantic and Pacific Railroad Company.*

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, push cars and other equipment owned, possessed or used by said Atlantic and Pacific Railroad Company upon its entire line aforesaid. \$452,960

Said company returns its personal property in the county of Bernalillo, because it is advised that the situs and domicile of its rolling stock are in said county and the same is returnable there, although the authorities in Arizona and California are attempting to enforce the collection of taxes upon the rolling stock included in this return, in their respective jurisdictions, notwithstanding the fact that the same is duly returned for taxation in New Mexico.

Track tools and all other personal property not having its situs or domicile in some other State or Territory, including office and station furniture, law library, books, stationary, supplies and materials, etc., at Albuquerque, Mitchell, Coolidge, Wingate, Gallup, and Manuelito.... 78,000

Total... \$530,960

Said return is of personal property which the Atlantic and Pacific Railroad Company has listed for taxation in the county of Bernalillo and Territory of New Mexico, notwithstanding the fact that the counties through which its road passes in the Territory of Arizona and State of California claim and insist upon the right to tax said property in proportion to the mileage said road may have in said counties.

65 Said company in making this return denies that any of its rolling stock is subject to taxation within the corporate limits of the city of Albuquerque and the town of Gallup, for city and town purposes; but herewith lists, on separate sheets, the proportionate value of all of its above-mentioned personal property within the corporate limits of said city and town, respectively, subject to taxation for territorial or county purposes.

Value of the proportion of personal property of the Atlantic and Pacific Railroad Company (valued at \$530,960) situate or having its situs within the corporate limits of the city of Albuquerque.

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, and other equipment owned, used or controlled by said company, and located within or running into the corporate limits of the city of Albuquerque..... \$170,000

Track tools and other personal property, including office and station furniture, law library, books, stationery, supplies and materials, etc., located within the corporate limits of said city of Albuquerque 30,000

Total. \$200,000

Value of the proportion of personal property of the Atlantic and Pacific Railroad Company (valued at \$530,960) situate or having its situs within the corporate limits of the town of Gallup, New Mexico.

Switch engines, track tools, and other personal property, including office and station furniture, situate within the corporate limits of the town of Gallup..... \$5,000

TERRITORY OF NEW MEXICO, {
County of Bernalillo, }⁸⁸ :

66 I, C. N. Sterry, do solemnly swear that I am the general attorney of the Atlantic and Pacific Railroad Company, and that, according to the best of my knowledge and belief, the above list contains a full and correct statement of the personal property of the said Atlantic and Pacific Railroad Company subject to taxation within the county of Bernalillo, in the Territory of New Mexico, which said company owns, possesses or controls, and which is not already assessed for the year 1893, together with the proportion of said personal property situate within the limits of the city of Albuquerque, and the proportion thereof situate within the limits of the town of Gallup.

C. N. STERRY.

Subscribed and sworn to before me this 15th day of April, A. D. 1893.

[SEAL.]

KARL A. SNYDER,
Notary Public.

EXHIBIT B.

List of Personal Property.

Belonging to, claimed by, or in the possession or under the control of the receivers of the Atlantic and Pacific Railroad Company (Western division), a corporation created by act of Congress, having its principal place of business at Albuquerque, New Mexico; the line of its road passing through the counties of Bernalillo and Valencia, in said Territory of New Mexico, and thence through the counties of Apache, Coconino, Yavapai and Mohave, in the Territory of Arizona, to the eastern boundary line of the State of California; thence through the counties of San Bernardino and Kern, in said State, to the western end of said line and its terminus at

67 Mojave, in said county of Kern, a total distance of 802.8 miles; the total mileage of said line owned by said company

in said Territory of New Mexico being 166.6 miles, of which 73.142 miles are in Bernalillo county, and 93.458 miles are in Valencia county.

And the receivers of said company make a full report of all of its personal property as follow, to wit:

Personal Property Owned by the Atlantic and Pacific Railroad Company.

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, push cars, hand cars and all other equipment owned, possessed or used by said Atlantic and Pacific Railroad Company upon its entire line aforesaid..... \$452,960

Said company returns said personal property in the county of Bernalillo, because it is advised that the situs and domicile of its rolling stock are in said county and the same is returnable there, although the authorities in Arizona and California are attempting to enforce the collection of taxes upon the rolling stock included in this return, in their respective jurisdictions, notwithstanding the fact that the same is duly returned for taxation in New Mexico.

Track tools and all other personal property not having its situs or domicile in some other State or Territory, including office and station furniture, law library, books, stationery, supplies and materials, etc., at Albuquerque, Mitchell, Coolidge, Wingate, Gallup and Manuelito..... 78,000

Total..... \$530,960

68 Said return is of personal property which the receivers of the Atlantic and Pacific Railroad Company have listed for taxation in the county of Bernalillo, Territory of New Mexico, notwithstanding the fact that the counties through which its road passes in the Territory of Arizona and State of California claim and insist upon the right to tax said property in proportion to the mileage said road may have in said counties.

The receivers of said company in making this return deny that any of its rolling stock is subject to taxation within the corporate limits of the city of Albuquerque and the town of Gallup, for city and town purposes; but herewith list on separate sheets, the proportionate value of all of its above-mentioned personal property within the corporate limits of said city and town, respectively, subject to taxation for territorial or county purposes.

Value of the proportion of personal property of the Atlantic and Pacific Railroad Company (valued at \$530,960.00), situate or having its situs within the corporate limits of the city of Albuquerque, New Mexico.

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, and other equipment owned, used or controlled by said company, and located within or running into the corporate limits of the city of Albuquerque. \$170,000

Track tools and other personal property, including office and station furniture, law library, books, stationery, supplies and materials, etc., located within the corporate limits of the city of Albuquerque \$30,000

Total \$200,000

69 Value of the proportion of personal property of the Atlantic and Pacific Railroad Company (valued at \$530,960), situate or having its situs within the corporate limits of the town of Gallup, New Mexico.

Switch engines, track tools and all other personal property, including office and station furniture, situate within the corporate limits of the town of Gallup. \$5,000

TERRITORY OF NEW MEXICO, }
County of Bernalillo, } ss :

I, C. N. Sterry, do solemnly swear that I am the general attorney for the receivers of the Atlantic and Pacific Railroad Company, and that, according to the best of my knowledge and belief, the above list contains a full and correct statement of the personal property of the said Atlantic and Pacific Railroad Company subject to taxation within the county of Bernalillo, in the Territory of New Mexico, which said receivers own, possess or control, and which is not already assessed for the year 1894, together with the proportion of said personal property situate within the limits of the city of Albuquerque, and the proportion thereof situate within the limits of the town of Gallup.

C. N. STERRY.

Subscribed and sworn to before me this 31st day of March, A. D. 1894.

[SEAL.]

KARL A. SNYDER,
Notary Public.

EXHIBIT C.

Bernalillo county, New Mexico, 1895.

List of Personal Property

70 Belonging to, claimed by, or in the possession or under the control of the receivers of the property of the Atlantic and Pacific Railroad Company (Western division), a corporation

created by act of Congress, having its principal place of business at Albuquerque, New Mexico; the line of its road running through the counties of Bernalillo and Valencia, in said Territory of New Mexico; thence through the counties of Apache, Navajo, Coconino, Yavapai, and Mohave, in the Territory of Arizona, to the eastern boundary line of the State of California; thence through the counties of San Bernardino and Kern, in said State, to the western end of said line and its terminus at Mojave in said county of Kern, a total distance of 805.86 miles; the total mileage of said line owned by said company in said Territory of New Mexico being 166.6 miles, of which 73.142 miles are in Bernalillo county and 93.458 miles are in Valencia county.

And the receivers of the property of said company make a full report of all its personal property as follows, to wit:

Personal Property Owned by the Atlantic and Pacific Railroad Company.

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, push cars, hand cars, and all other equipment owned, possessed or used by said receivers or said company upon the entire line aforesaid..... \$452,960

Said receivers return said property in the county of Bernalillo because they are advised that the situs and domicile of the rolling stock of said company are in said county and the same is returnable there, although
71 the authorities in Arizona and California are attempting to enforce the collection of taxes upon the rolling stock included in this return in their respective jurisdictions, notwithstanding the fact that the same is duly returned for taxation in New Mexico.

Track tools and all other personal property not having its situs or domicile in some other State or Territory, including office and station furniture, law library, books, stationery, supplies and materials, etc., at Albuquerque, Mitchell, Coolidge, Wingate, Gallup and Manuelito.... 78,000

Total... \$530,960

Said return is of personal property which the receivers of the property of the Atlantic and Pacific Railroad Company have listed for taxation in the county of Bernalillo and Territory of New Mexico, notwithstanding the fact that the counties through which the road runs in the Territory of Arizona and State of California claim and insist upon the right to tax said property in proportion to the mileage said road may have in said counties.

The receivers of the property of said company in making this return deny that any of its rolling stock is subject to taxation within the corporate limits of the city of Albuquerque and the town of Gallup, for city and town purposes; but herewith list on separate sheets, the proportionate value of all of its above-men-

tioned personal property within the corporate limits of said city and town respectively, subject to taxation for territorial and county purposes.

Value of the proportion of personal property of the Atlantic and Pacific Railroad Company (valued at \$530,960) situate or
72 having its situs within the corporate limits of the city of Albuquerque, N. M.

All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat, and coal cars, and other equipment owned, used or controlled by said company or the receivers thereof, and located within or running into the corporate limits of the city of Albuquerque..... \$170,000

Track tools and other personal property, including office and station furniture, law library, books, stationery, supplies and materials, etc., located within the corporate limits of the city of Albuquerque..... 30,000

Total \$200,000

Value of the proportion of personal property of the Atlantic and Pacific Railroad Company (valued at \$530,960) situate or having its situs within the corporate limits of the town of Gallup, N. M.

Switch engines, track tools, and all other personal property, including office and station furniture, situate within the corporate limits of the town of Gallup \$5,000

TERRITORY OF NEW MEXICO, }
County of Bernalillo, } ss:

I, C. N. Sterry, do solemnly swear that I am the general attorney for the receivers of the property of the Atlantic and Pacific Railroad Company, and that, according to the best of my knowledge and belief the above list contains a full and correct statement of the personal property of the said Atlantic and Pacific Railroad Company, subject to taxation within the county of Bernalillo, in the Territory of New Mexico, for the year 1895, which said company or said re-
73 & 74 ceivers own, possess or control, and which is not already assessed for the year 1895, together with the proportion of said personal property situate within the limits of the city of Albuquerque, and the proportion thereof situate within the limits of the town of Gallup.

C. N. STERRY.

Subscribed and sworn to beford me this 23d day of March, A. D. 1895.

[SEAL.]

KARL A. SNYDER,
Notary Public.

(Here follow Exhibits "D," "E," and "F," marked pp. 75, 76, and 77.)

78

Regular Session.

ALBUQUERQUE, N. M., Oct. 7th, 1895.

Now comes Frank A. Hubbell, assessor of Bernalillo county, and presents to the board the assessment-rolls for the year 1895 as completed by him, and showing the total assessed value of \$8,885,049. Amounting to the following amounts as divided to the several funds, according to the levy made and ordered, viz:

Territorial purposes.....	\$53,314 73
Territorial institutions.....	15,550 13
Territorial cattle indemnity.....	15 93
County court fund.....	26,655 88
County general purposes.....	75,524 91
County school general.....	22,215 94
City of Albuquerque.....	26,063 13
City of Albuquerque schools...	13,033 31
Town of Gallup.....	880 76
Town of Gallup schools.....	3,658 97
School district No. 12.....	405 77
School districts No. 13 and 35.....	567 90
Total	\$237,888 36

The board after having carefully examined said tax-rolls are of the opinion that the same are correct and in good order, and therefore approve the same.

TERRITORY OF NEW MEXICO, {
County of Bernalillo. }

OFFICE OF THE BOARD OF COUNTY COMMISSIONERS,
ALBUQUERQUE, N. M.

At a regular session held on the 7th day of October, A. D. 1895, It is ordered by the board of county commissioners of said county that the preceding assessment-roll, and each and every assessment therein contained, as originally returned and assessed, or as shown therein to have been revised and corrected, by the board, be, and the same is hereby approved; and that a tax of $\frac{8.5}{100}$ of 1% for county purposes, and of two and one-half mills on the dollar for school purposes, and of 3 mills on the dollar for court fund, and for various territorial funds, to wit:

For territorial purposes, 6 mills on the dollar.

For territorial institutions fund, 1 $\frac{7.5}{100}$ mills on the dollar.

For cattle indemnity fund $\frac{5.0}{100}$ mills on the dollar of the appraised

value of cattle is hereby levied upon all the property therein returned assessed liable to taxation.

J. M. SANDOVAL,
Chairman of the Board.
 JESUS ROMERO,
 W. W. STRONG,
Commissioners.

Attest:
 J. S. GARCIA,
 [SEAL.] *Probate Clerk, &c.*

And thereupon, on the same day, to wit: the 12th day of March, 1896, there was duly made and entered of record in the said cause, an order, which said order is in the words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico, for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Com- plainant, <i>vs.</i>	} No. 1122.
ATLANTIC AND PACIFIC RAILROAD COMPANY, ATCH- ison, Topeka and Santa Fe Railroad Company, St. Louis and San Francisco Railway Company, and others. }	

80 Upon the reading and filing of the petition of the Territory of New Mexico praying that the said receiver of the Atlantic and Pacific Railroad Company may be ordered to pay all unpaid taxes levied and assessed against the Atlantic and Pacific Railroad Company as they appear upon the tax-roll of said county of Bernalillo for the year 1895, and that said petitioner may have such other and further relief in the premises as equity may require; and after hearing Thomas N. Wilkerson, district attorney for the counties of Bernalillo and Valencia, and being now fully advised of and concerning said petition,

It is ordered, adjudged and decreed, by the court, that said petitioner, the said Territory of New Mexico, be and is hereby granted leave to intervene herein; and that the parties complainant, and respondent to this cause be, and they are hereby ruled to show cause before the Honorable Needham C. Collier, at chambers at the courthouse in the county of Bernalillo on the 30th day of March, A. D. 1896, at 10 o'clock in the forenoon of said day why the prayer of said intervening petitioner should not be granted; and it is further

Ordered, adjudged and decreed, by the court that the attorney for the said intervening petitioner serve copies of said petition upon Neill B. Field, Esq., solicitor for complainant, W. B. Childers, Esq., solicitor for the Mercantile Trust Company, H. L. Waldo, Esq., solicitor for the three railroad companies defendants herein, and

C. N. Sterry, Esq., solicitor for the receiver herein, on or before the 20th day of March, 1896.

N. C. COLLIER, *Judge.*

81 We hereby acknowledge service of the above petition on the 20th day of March, 1896, and waive service of the exhibits.

C. N. STERRY,
Solicitor for Receiver.

And thereafter and on, to wit: the 28th day of April, 1896, there was filed in the office of the clerk of the said court the answers of the United States Trust Company of New York, and of C. W. Smith, receiver in the said cause, to the intervening petition of the Territory of New Mexico, which said answers are as follows, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

THE UNITED STATES TRUST COMPANY OF NEW YORK,	} No. 1122.
Complainant,	
vs.	
THE ATLANTIC AND PACIFIC RAILROAD COMPANY <i>et al.</i> ,	
Defendants.	

Answer of the United States Trust Company to the intervening petition of the Territory of New Mexico seeking to procure an order upon the receiver to pay certain taxes levied upon the property of the Atlantic and Pacific Railroad Company in Bernalillo county, Territory of New Mexico, for the year 1895.

82 The United States Trust Company by protestation not confessing or acknowledging all or any part of the matters or things in the intervening petition of the Territory of New Mexico filed herein, to be true, in such manner and form as the same are therein set forth and alleged, does answer and plead thereto in relation to the amount of taxes alleged to have been levied or assessed for the year 1896 against the property of the Atlantic and Pacific Railroad Company, amounting in the aggregate to the sum of \$61,688.46, the following facts:

That the Atlantic & Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27th, 1866, and that under and by virtue of said act and prior to the year 1894, the Atlantic & Pacific Railroad Company constructed and built, and has ever since maintained in the county of Bernalillo and in said Territory of New Mexico, about seventy-four miles of railroad, the exact length of which the defendant herein is unable to state; that said line of railroad so built and constructed was and is built and constructed upon the right of way granted to the Atlantic and Pacific Railroad Company under and by virtue of said act of Congress aforesaid, which said right of way was and is

200 feet in width, including all the necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations; that in addition to the milage hereinabove stated, the said railroad company has constructed nearly twenty-eight miles of side track in addition to the main track; that the said railroad company has also station-houses, shops, depots, water tanks, and improvements of like character at the stations known and called as follows:

A. & P. Junction, Mitchell, Coolidge, Wingate, Gallup, Manuelito, and Albuquerque.

83 That upon the right of way and station grounds of the Atlantic & Pacific Railroad Company in the county of Bernalillo, Territory of New Mexico, the said railroad company had prior to the first day of January, 1890, constructed and permanently attached to its right of way and station grounds its line of railroad consisting of ties and rails, bolts, bars, dirt, stone and culverts, sufficient to make a railroad track to operate trains upon; all of which became and was a part of said right of way; it also had permanently attached to its right of way and station grounds its station buildings, depots, machine shops, water tanks and other of like character of buildings and improvements at the stations above named. It also built and permanently attached to said right of way switches, side tracks and turn-tables, so that prior to the first day of January, 1890, and ever since said time the railroad track of said company and said buildings and improvements above mentioned were and ever since said time have been permanently attached to and become a part of said right of way.

The United States Trust Company admits that receivers were, are and have been appointed by this court of the property of the Atlantic & Pacific Railroad Company as alleged in said intervening petition.

And the United States Trust Company further admits that the Atlantic & Pacific Railroad Company for the year 1893, and the receivers of its property for the years 1894 and 1895 duly made returns to the assessor of said county and Territory of the property admitted by said railroad company and by said receivers to be subject to taxation in said county and Territory, and that copies of said returns are shown by Exhibits "A," "B," and "C" to the intervening petition.

84 The United States Trust Company further admits that the assessor of the county of Bernalillo, during the year 1895, under instructions from the board of county commissioners, entered upon the assessment-roll of said county for said year an assessment, a true copy of which is set out and set forth in the intervening petition; and this defendant alleges and shows that the action of said assessor in so making said assessment was wrong and illegal, and that each and every item of property mentioned and described in said assessment was and is a part of the right of way and station grounds of the said railroad company, and was and is exempt from taxation in this Territory by and through the provisions contained in the second section of the charter of said railroad com-

pany. That each and every of the things mentioned and described in said assessment constitutes and is a part of the line of railroad of the said railroad company, permanently attached to and permanently a part of said right of way, save and except the specific items mentioned as station-houses, depots, shops, switches, water tanks, and improvements at the different stations. That no one thing or item of property mentioned and described in said assessment was or is subject or liable to taxation in the Territory of New Mexico, and that each and every item thereof was and is permanently attached, affixed to, and was and is a part of said right of way, which was and is exempt from taxation.

That upon said right of way and station grounds, prior to 1890, the Atlantic and Pacific Railroad Company had constructed, and permanently attached to its right of way and station grounds, ties and rails sufficient to make a railroad track to operate its trains upon, and all necessary station buildings, depots, machine shops, switches, side tracks, turn-tables and water tanks; and it also had permanently constructed thereon bridges and culverts of iron,
85 stone and wood; and it also built, established and maintained over, along and upon its said right of way, a grade for its track and side tracks, which was and is built in a permanent manner, and that the ties for its tracks were and are firmly embedded in this grade, which consists of earth, gravel, cinders and stone; and that the rails for its main and side tracks are spiked to and firmly fastened to its ties so imbedded in said grade, so that the same form a substantial and permanent railroad track and side tracks for the operation of the railroad trains of the Atlantic and Pacific Railroad Company, consisting of both passenger and freight trains thereon; that the bridges and culverts built and maintained by the railroad company upon said right of way in said county and Territory, are a part of said main track and side tracks; and that the buildings at the stations, above described, are such as were and are necessary for the operation of the said railroad by said railroad company, and are permanently attached and fixed to said station grounds and right of way.

That the property described in said assessment was and is a part and portion of the property placed upon said right of way for a railroad track upon which to operate trains, and a part of the buildings necessary in the operation of railroad trains upon said right of way; and the United States Trust Company further says that it admits that said assessor also placed upon said assessment-roll the same property under the same description as property omitted for the years 1893 and 1894, and that the property so placed by the assessor upon the assessment-roll had taxes levied upon it for the year 1895 in the sum of \$30,311.74, and for the year 1893 at \$15,688.36; also
for the year 1894 at the sum of \$15,688.36.

86 The United States Trust Company further says that included in the tax levied for the year 1895 is a tax which was properly levied upon property returned by the receivers to the assessor, the exact amount of which this defendant is unable to state, but believes it to be less than \$14,000.

The United States Trust Company further says that outside of the taxes levied upon the property returned by the receivers to the assessor for taxation, each, all and every part of said taxes is illegal and void, and wrongfully levied.

Further answering, the United States Trust Company denies each and every other matter and thing in said intervening petition alleged.

The rate of taxation for the year 1895 was different from the years 1893 and 1894.

All of which matters and things hereinabove stated and set forth the United States Trust Company avers to be true, and pleads the same to said intervening bill of complaint as good and sufficient cause for refusing to pay the taxes illegally levied as aforesaid.

F. B. JENNINGS,

Solicitor for the United States Trust Company.

Service of the above answer acknowledged, and I hereby consent that the same may be filed as of March 30th, 1896.

(Signed)

THOS. N. WILKERSON,

District Attorney.

(Endorsed :) Filed in my office this April 28th, 1896, as of March 30th, 1896. O. N. Marron, clerk.

87 In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK, Com-	} No. 1122.
plainant,	
vs.	
THE ATLANTIC AND PACIFIC RAILROAD COMPANY <i>et al.</i> ,	}
Defendants.	

Answer of C. W. Smith, receiver of the property of the Atlantic and Pacific Railroad Company, to the intervening petition of the Territory of New Mexico seeking to procure an order upon the receiver to pay certain taxes levied upon the property of the Atlantic and Pacific Railroad Company in Bernalillo county, Territory of New Mexico, for the year 1895.

C. W. Smith, receiver of the property of the Atlantic and Pacific Railroad Company, by protestation not confessing or acknowledging all or any part of the matters or things in the intervening petition of the Territory of New Mexico filed herein, to be true, in such manner and form as the same are therein set forth and alleged, does answer and plead thereto in relation to the amount of taxes alleged to have been levied or assessed for the year 1896 against the property of the Atlantic and Pacific Railroad Company, amounting in the aggregate to the sum of \$61,688.46, the following facts:

88

That the Atlantic and Pacific Railroad Company was incorporated by the act of Congress of the United States of America, approved July 27th, 1866, and that under and by virtue of said act and prior to the year 1894, the Atlantic and Pacific Railroad Company constructed and built, and has ever since maintained in the county of Bernalillo, in said Territory of New Mexico, about seventy-four miles of railroad, the exact length of which the defendant herein is unable to state; that said line of railroad so built and constructed was and is built and constructed upon the right of way granted to the Atlantic and Pacific Railroad Company under and by virtue of said act of Congress aforesaid, which said right of way was and is 200 feet in width, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-table, and water stations; that in addition to the mileage hereinabove stated, the said railroad company has constructed nearly twenty-eight miles of side track in addition to the main track; that the said railroad company has also station-houses, shops, depots, water tanks, and improvements of like character at the stations known and called as follows:

A. & P. Junction, Mitchell, Coolidge, Wingate, Gallup, Manuelito, and Albuquerque.

That upon the right of way and station grounds of the Atlantic and Pacific Railroad Company in the county of Bernalillo, Territory of New Mexico, the said railroad company had prior to the first day of January, 1890, constructed and permanently attached to its right of way and station grounds its line of railroad consisting of ties and rails, bolts, bars, dirt, stone and culverts, sufficient to make
 89 a railroad track to operate trains upon; all of which became and was a part of said right of way; it also had permanently attached to its right of way and station grounds its station buildings, depots, machine shops, water tanks and other of like character of buildings and improvements at the stations above named. It also built and permanently attached to said right of way switches, side tracks and turn-tables, so that prior to the first day of January, 1890, and ever since said time the railroad track of said company and said buildings and improvements above mentioned were and ever since said time have been permanently attached to and become a part of said right of way.

This defendant admits that receivers were and have been appointed by this court of the property of the Atlantic and Pacific Railroad Company as alleged in said intervening petition, and that this defendant is now and ever since the first day of February, 1890, has been the duly appointed, qualified and acting receiver of the property of said railroad company.

And this defendant further admits that the railroad company for the year 1893, and the receivers of its property for the years 1894 and 1895, duly made returns to the assessor of said county and Territory of the property admitted by said railroad company and by said receivers to be subject to taxation in said county and Territory, and that copies of said returns are shown by Exhibits "A," "B," and "C" to the intervening petition.

The defendant further admits that the assessor of the county of Bernalillo, during the year 1895, under instructions from the board of county commissioners, entered upon the assessment-roll of said county for said year an assessment, a true copy of which is set out and set forth in the intervening petition; and this defendant alleges and shows that the action of said assessor in so making said assessment was wrong and illegal, and that each and every item of property mentioned and described in said assessment was and is a part of the right of way and station grounds of the said railroad company, and was and is exempt from taxation in this Territory by and through the provisions contained in the second section of the charter of said railroad company. That each and every of the things mentioned and described in said assessment constitutes and is a part of the line of railroad of the said railroad company, permanently attached to and permanently a part of said right of way, save and except the specific items mentioned as station-houses, depots, shops, switches, water tanks, and improvements at the different stations. That no one thing or item of property mentioned and described in said assessment was or is subject or liable to taxation in the Territory of New Mexico, and that each and every item thereof was and is permanently attached, affixed to, and was and is a part of said right of way, which was and is exempt from taxation.

That upon said right of way and station grounds, prior to 1890, the Atlantic and Pacific Railroad Company had constructed, and permanently attached to its right of way and station grounds, ties and rails sufficient to make a railroad track to operate its trains upon, and all necessary station buildings, depots, machine shops, switches, side tracks, turn-tables and water tanks; and it also had permanently constructed thereon bridges and culverts of iron, stone and wood; and it also built, established and maintained over, along and upon its said right of way, a grade for its track and side tracks, which was and is built in a permanent manner, and that the ties for its tracks were and are firmly embedded in this grade, which consists of earth, gravel, cinders and stone; and that the rails for its main and side tracks are spiked to and firmly fastened to its ties so imbedded in said grade, so that the same form a substantial and permanent railroad track and side tracks for the operation of the railroad trains of the Atlantic and Pacific Railroad Company, consisting of both passenger and freight trains thereon; that the bridges and culverts built and maintained by the railroad company upon said right of way in said county and Territory, are a part of said main track and side track; and that the buildings at the stations, above described, are such as were and are necessary for the operation of the said railroad by said railroad company, and are permanently attached and fixed to said station grounds and right of way.

That the property described in said assessment was and is a part and portion of the property placed upon said right of way for a railroad track upon which to operate trains, and a part of the buildings necessary in the operation of railroad trains upon said right of way;

and this defendant further says that he admits that said assessor also placed upon said assessment-roll the same property under the same description as property omitted for the years 1893 and 1894, and that the property so placed by the assessor upon the assessment-roll had taxes levied upon it for the year 1895 in the sum of \$30,311.74, and for the year 1893 at \$15,688.36; also for the year 1894 at the sum of \$15,688.36.

This defendant further says that included in the tax levied for the year 1895 is a tax which was properly levied upon property returned by the receivers to the assessor, the exact amount of which this defendant is unable to state, but believes it to be less than \$14,000.

92 and which amount this defendant says is justly due from him as such receiver, and which sum, when ascertained he is ready and willing to pay.

This defendant further says that outside of the taxes levied upon the property returned by the receivers to the assessor for taxation, each, all and every part of said taxes is illegal and void, and wrongfully levied.

Further answering, this defendant denies each and every other matter and thing in said intervening petition alleged.

The rate of taxation for the year 1895 was different from the rate for the years 1893 and 1894.

All of which several matters and things hereinabove stated and set forth this defendant avers to be true, and pleads the same to said intervening bill of complaint as good and sufficient cause for refusing to pay the taxes illegally levied as aforesaid.

C. N. STERRY,

*Solicitor and of Counsel for the defendant, C. W. Smith,
Receiver of the Property of the Atlantic and
Pacific Railroad Company, Aforesaid.*

And thereafter on the same day, to wit, the 28th day of May, 1896, there was filed in the said office of the clerk of the said court an agreed statement of facts upon which the said intervening petition was to be heard, which said agreed statement of facts is as follows, to wit:

TERRITORY OF NEW MEXICO, ()
County of Bernalillo.)

In the District Court of the Second Judicial District of the Territory of New Mexico, Sitting to Hear and Determine Causes Arising Under the Constitution and Laws of the United States.

93 THE UNITED STATES TRUST COMPANY OF)
NEW YORK, Plaintiff,)
vs.) In Equity. No.
THE ATLANTIC AND PACIFIC RAILROAD COMPANY) 1122.
et al., Defendants.)

Agreed Statement of Facts.

For the purposes of the hearing to be had upon the intervening petition of the Territory of New Mexico, in the above-entitled cause,

and answers thereto of C. W. Smith, the receiver of the Atlantic and Pacific Railroad Company, and the United States Trust Company, it is hereby stipulated and agreed, by and between said above-named parties that the following facts shall be accepted and received by the judge or court in determining the questions involved as the facts in the case.

That on and prior to January 1st, 1892, the Atlantic and Pacific Railroad Company, under the provisions of its charter definitely located its line of road and right of way through Bernalillo county, which said right of way so located involved all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations. That upon said right of way so located through the city of Albuquerque in said county was definitely located necessary grounds for station buildings, workshops, depots, machine shops, side tracks, turn-tables, and water stations; and there was also located upon said right of way at the Atlantic and Pacific junction, at Chaves, or Mitchell, at Coolidge, at

94 Wingate, at Gallup and at Manuelito, necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations.

That thereafterwards and prior to 1893, there was built and constructed upon said right of way by the Atlantic and Pacific Railroad Company, a railroad from a point of junction with the Atchison, Topeka & Santa Fé Railroad Company at Isleta, fifteen miles south of Albuquerque, a railroad along said right of way from said junction point to the Colorado river in the Territory of Arizona; that the Atlantic & Pacific Railroad Company has under an agreement with the Atchison, Topeka and Santa Fé Railroad Company, occupied and used the tracks of the last-named company between the junction of the two railroads at Isleta and the city of Albuquerque as and for the railroad of the Atlantic and Pacific Railroad Company to the extent that its business required the use and operation of such railroad for itself, or in other words, under contract between the two companies the railroad of the Atchison, Topeka and Santa Fé Railroad Company through the city of Albuquerque to the junction at Isleta, a distance of about fifteen miles, is jointly used by the two railroad companies; said railroad running through the reservations for machine shops, etc., aforesaid, of the Atlantic and Pacific Railroad Company at Albuquerque; that the right of way so located by the Atlantic and Pacific Railroad Company and upon which it built its railroad as aforesaid, runs through Bernalillo county, and is situated in Bernalillo county as follows:

Commencing at the A. & P. Junction referred to, it runs thence in a westerly direction four miles 3,780 feet to the division line between Bernalillo county and Valencia county, and then after crossing a portion of Valencia county at a point known as station 5,247

95 it again runs through Bernalillo county 68 miles and 44 feet to the west line of the county of Bernalillo, being the west line of the Territory of New Mexico; which said right of way, outside of the reservation for station grounds, etc., was located, and is

of the width of 200 feet, being 100 feet on each side of the center of the railroad track located thereon.

That in due time the former receivers of the property of the Atlantic and Pacific Railroad Company appointed by this court returned to the assessor of Bernalillo county as property belonging to said railroad company, taxable in said county, certain property which was and is described in said returns as follows, to wit:

List of personal property belonging to, or claimed by, or in the the possession or under the control of the receivers of the Atlantic and Pacific Railroad Company (Western division), a corporation created by act of Congress, having its principal place of business at Albuquerque, New Mexico:

The line of its road running through the counties of Bernalillo and Valencia in said Territory of New Mexico; thence through the counties of Apache, Navajo, Coconino, Yavapai and Mohave, in the Territory of Arizona, to the eastern boundary line of the State of California; thence through the counties of San Bernardino and Kern, in said State, to the western end of said line, and its terminus at Mojave in said county of Kern, a total distance of 805.86 miles, the total mileage of said line owned by said company in said Territory of New Mexico being 166.6, of which 73.142 are in Bernalillo county, and 93.458 miles are in Valencia county.

And the receivers of the property of said Company make a full report of all of its personal property as follows, to wit:

96	All the locomotives, passenger coaches, express and mail cars, cabooses, box, flat and coal cars, push cars, hand cars and all other equipment owned, possessed or used by said receivers or said Company upon the entire line aforesaid.....	\$452,960
	Track tools and all other personal property not having its situs or domicile in some other State or Territory, including office and station furniture, law library, books, stationery, supplies and materials, etc., at Albuquerque, Mitchell, Coolidge, Wingate, Gallup and Manuelito....	78,000
	Personal property within the city limits of Albuquerque..	200,000
	Personal property within the city limits of Gallup.....	5,000

That the above and foregoing was all the property returned for taxation in Bernalillo county by said receivers or by the railroad company itself; and that the same was made as the assessment of the property of said company subject to taxation in said county for the year A. D., 1895; that the county assessor of Bernalillo county in the year 1895 under the direction of the board of county commissioners of said county, placed on the assessment-roll an assessment of property against the Atlantic and Pacific Railroad Company for the year 1893. A true and correct copy of the assessment-roll showing such assessment so placed thereon, is filed with this as a part hereof, and as Exhibit "1"; which said exhibit shows the taxes levied, together with the values and penalties. That at the time the said assessor, under the instructions of said board, placed upon

97 said assessment-roll certain property claimed to be taxable property belonging to said railroad company, which was omitted from taxation for the year 1894. A true and correct copy of the assessment so made is shown by Exhibit "2" herewith filed and made a part hereof.

That the said assessor at the same time placed upon said assessment-roll property claimed to have been omitted and belonging to said company for the year 1895, a true and correct copy of which, said assessment-roll, with said last-named assessment placed upon it, is shown by Exhibit "3" hereto attached and made a part hereof, and filed herewith.

That these Exhibits show precisely the descriptions of property entered by the assessor, the penalties added and the values, and also the taxes levied thereon. Exhibit 3 also shows the description of the property as returned by the receivers.

That all the property so placed upon the assessment-roll by the assessor, outside of that returned by the receivers, was placed upon said assessment-roll without the knowledge or consent of the receivers, or of said railroad company; that the entire property placed upon the assessment-rolls by said assessor, outside of the property returned by the receivers, constituted and constitutes an actual part and portion of the roadbed and railroad track thereon, situated on the right of way of the Atlantic and Pacific Railroad Company in Bernalillo county, in the Territory of New Mexico, and constitutes the railroad used and occupied by the Atlantic and Pacific Railroad Company under its charter and in accordance with the provisions thereof; and the machine shops, station buildings, water-tanks, section-houses and other buildings of like character connected with and a part of the machinery used in the operation of said railroad, that each and every item of property described in the

98 assessments so placed upon the said assessment-roll, outside of the property returned by the receivers, is property that is actually and permanently attached to the right of way and station grounds of the Atlantic and Pacific Railroad Company, and constitutes an actual part and portion of the superstructure placed upon said right of way by said railroad company for its railroad and for its machine shops, turn-tables, side-tracks, switches, water tanks, station buildings, and other buildings of the same class and character actually used and needed in the operation of said railroad; and that no part of the same was at the time of the placing of said assessments upon said assessment-rolls by the assessor, detached from the actual right of way and station grounds of said railroad company; but on the contrary was firmly affixed thereto; that it was described as it was by the assessor in placing the same upon the assessment-roll for the purpose of escaping the exemption from taxation contained in the second section of the act of Congress approved July 27th, 1866, known as the charter of the Atlantic and Pacific Railroad Company; the assessor desiring to assess everything placed on the right of way separate from the right of way, no matter how permanently attached and affixed to the right of way.

That during the year 1893 there were no receivers in possession

of said property, and that said railroad was being operated by the railroad company itself, and if any property was omitted to be returned for taxation which ought to have been returned to the assessor of Bernalillo county, it was the fault and neglect of the railroad company itself, and not the fault and neglect of the receivers afterwards appointed.

That at Albuquerque, upon the reservations and station grounds there was situated the largest machine shops of the said railroad company, the general office building and such buildings as pertain to the headquarters of a railroad company; said buildings and reservation constitute the headquarters of the Western division of the Atlantic and Pacific Railroad Company, and since the appointment of receivers, of the receivers operating the same.

That the assessor in placing each of these three assessments upon the assessment-rolls as stated, added to the actual value of the property one-fourth of such value, as a penalty for the failure on the part of the receiver to return such property for taxation.

That in 1893 the railroad company, and in 1894 and 1895 the receivers, omitted all property that was firmly and fixedly attached to the right of way of said railroad company and to station grounds, under the honest belief that the same constituted a part of the right of way and was exempt from taxation.

(Signed)

THOS. N. WILKERSON,

Solicitor for Petitioner.

C. N. STERRY,

Solicitor for C. W. Smith, and Also in this Particular

Matter for United States Trust Company.

TERRITORY OF NEW MEXICO, }
Second Judicial District Court, } ss:

I, O. N. Marron, clerk of said court, do hereby certify that Exhibits "1," "2," and "3" to the agreed statement of facts are the same as Exhibits "D," "E," and "F" to the intervening petition of the Territory of New Mexico and are hereby omitted for that reason.

O. N. MARRON, *Clerk.*

And thereafter and on, to wit: the 5th day of June, 1896, there was filed in the office of the clerk of the said court the opinion
 100 of the court relative to the question of the payment of said taxes to the said intervening petitioner; which said opinion of the court is as follows, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

THE UNITED STATES TRUST COMPANY OF NEW YORK, Complainant,	}	No. 1122. Chancery.
<i>vs.</i>		
THE ATLANTIC AND PACIFIC RAILROAD COMPANY <i>et al.</i> , Defendants.	}	

In the matter of the intervening petition of the Territory of New Mexico for an order on the receiver to pay taxes.

Opinion of the Court.

In this case the agreed statement of facts as to the disputed tax shows that the assessment upon which it was based appeared on the roll of the assessor for Bernalillo county made up for the year 1895 under the head of "Additional assessment," appearing three times, to wit: for the years 1893, 1894 and 1895. The property under this head is listed by the assessor as "the improvements, cross-ties, rails, fish-bar plates, bolts, bridges, culverts, and structures, together with the telegraph line erected and constructed upon the right of way of the said railroad company," amounting to \$475,865, and "station-houses, shops, depots, switches, water tanks, and improvements at different stations in said county, amounting in the aggregate to \$64,085, making in all \$539,950. To this amount the assessor has added twenty-five per cent. for penalty for each of said years and the taxes extended include said penalties as part thereof.

The aggregate of property under the head of "Additional assessment" is placed in the column of the roll entitled "Value of personal property," and the agreed statement of facts recites that the receivers of the property made full report of all of its personal property being property not embraced under the head of "Additional assessment."

This agreed statement also recites that all property under the head of "Additional assessment" was property that was firmly and fixedly attached to the right of way of said railroad company and to station grounds thereon, and that the railroad company in 1893 and the receivers in 1894 and 1895 omitted to return same for taxation under the honest belief that the same constituted a part of the right of way and was exempt from taxation, the said right of way being so exempt under the second section of the charter granted by Congress.

The first and principal question raised upon said intervening petition is as to the liability of the railroad company at all for any tax upon the property listed by the assessor under the head of "Additional assessment" because of the exemption from taxation of right of way of said railroad company.

I have already held in an intervening petition filed in the case of The Mercantile Trust Company against The Atlantic and Pacific

Railroad Company by the collector of the county of Valencia that the grant of exemption from taxation of the right of way of said railroad company does not extend to the superstructure placed thereon. This conclusion was arrived at, as being in obedience to the doctrine emphasized in repeated decisions of the Supreme Court of the United States extending from a period long prior to the date of said company's charter to the latest decision called to my attention being the case of *Wilmington & W. R. R. Co. vs. Alsbrook*, 146 U. S., 279, rendered in 1892. In the case cited the court say speaking by Chief Justice Fuller "The taxing power is essential to the existence of government, and cannot be held to have been relinquished in any instance unless the deliberate purpose of the State to that effect clearly appears. The surrender of a power so vital cannot be left to inference or conceded in the presence of doubt and when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power." Here it might be reasonably contended, I think, that the exemption from taxation of a right of way means merely the soil constituting the right of way, and the learned Chief Justice says in such case "The conclusion is inevitable in favor of the reservation of the power" to tax.

It is also urged, though I cannot think plausibly, that the designation by the assessor of this property as personal property invalidates the assessment. It is not pretended that this makes any difference in the extension of the taxes, or that it serves in any way to mislead as to what property is meant, and I therefore cannot see that there is any error here of any materiality.

The question of penalty is one that calls for some consideration of our statute. The assessor in listing this property as omitted property proceeded under section 2847, C. L. N. M., 1884, which required him to place it "upon the assessment-roll before the same is returned to the board of county commissioners, with all arrearages of taxes which should have been assessed and paid in former years charged thereon," and in extending the taxes he added a penalty of twenty-five per cent. to the value of this omitted property.

The authority for this penalty is claimed to be found in section 2825, which reads as follows: "If any person liable to taxation shall fail to render a true list of his property as required by the preceding three sections, the assessor shall make out a list of the property of such person and its value according to the best information he can obtain; and such person shall be liable, in addition to the tax so assessed, to a penalty of twenty-five per cent. thereof, which shall be assessed and collected as a part of the taxes of such person." A reading of this section shows, when taken in connection with 2826, that the penalty which is visited upon such delinquent is the adding to his entire taxes twenty-five per cent. for a particular year. In section 2826 the language is a penalty of twenty-five per cent. to be added to the amount of the taxes assessed upon the true amount and value of his property. Those who make no return whatever and those who make a false return are placed in the same condition.

The assessor's duty in each instance is the same, viz: "To make out a list" himself.

For the years 1893 and 1894 the assessor accepted the list made out by the tax-payer and taxes were extended thereon and collected. It can hardly be said that afterwards a penalty of twenty-five per cent. upon the listed and omitted property should be collected, and yet the statute provides only for that kind of penalty. If there is no authority to collect the full penalty, I do not see how it can be inferred from any clear statutory provision that anything less than such full penalty is collectible. That this construction is correct

seems to me to be enforced by the reading of section 2848, 104 which provides in effect, that if after the tax-list has been de-

livered to the collector he discovers omitted property he may assess the same. There is no warrant anywhere for the collector's changing the roll in any other respect. To carry section 2848 back to section 2825 for the purpose of adding penalty seems to me not allowable under fair construction. I think that when the year had passed and taxes had been actually paid, a status had been acquired by the tax-payer which prevented going back and visiting a penalty, the authority for which rested only in inference. To levy a penalty the authority under the statute should be clear and unambiguous. I think therefore that as to the years 1893 and 1894 no penalties are assessable or collectible.

As to the year 1895 I am of the opinion that the case stands somewhat different. The assessment should be viewed as one of property listed by the assessor and not by the receivers, and the only error made in that consists in the fact that the penalty should have been on the entire assessment and not on the omitted portion. This being an error in favor of the receivers, where a right to fix a larger penalty existed, cannot be objected to by them.

As to the interest claimed on delinquent taxes, I am of the opinion that it should be allowed, and the intervening petition will be referred to the special master in this cause to report what taxes, penalty and interest are due in accordance with this opinion, and when report is made a decree will be entered.

This opinion will be filed in the case for the guidance of said special master.

(Signed)

N. C. COLLIER, *Judge*.

105 And thereafter and on, to wit, the 25th day of June, 1896, there was made and entered of record in the said cause a decree of the court in the matter of the intervening petition of the Territory of New Mexico, which said decree is in the words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico for the Trial and Hearing of Causes Arising under the Constitution and Laws of the United States.

UNITED STATES TRUST COMPANY OF NEW YORK,	} No. 1122.
Complainant,	
<i>vs.</i>	
THE ATLANTIC AND PACIFIC RAILROAD COMPANY <i>et al.</i> ,	
Defendants.	

In the matter of the intervening petition of the Territory of New Mexico for an order on the receiver to pay taxes.

This cause having heretofore come on to be heard before the court, upon the intervening petition of the Territory of New Mexico for an order upon the receiver heretofore appointed in this cause to pay certain taxes levied and assessed in the county of Bernalillo in this judicial district, and upon the answer of the receiver, the answer of the complainant in the said cause, and the exhibits annexed to the said petitions and to the said answer, and upon the agreed statement of facts signed by the solicitors for the respective parties herein, and the court having heard the arguments of
106 said solicitors, the said complainant, The United States Trust Company appearing by C. N. Sterry and the said receiver by his solicitor, C. N. Sterry, Esq., and the said intervening petitioner by its solicitor, Thos. N. Wilkerson, Esq., and the same having been taken under advisement by the court, the court being now sufficiently advised in the premises,

It is ordered, adjudged and decreed, as follows, to wit:

First. That the additional assessment of \$539,950 levied and assessed by the assessor of the county of Bernalillo for the year 1893, is a valid assessment, and the tax levied thereon for the said year is a valid lien upon the property and franchises of the said railroad company, now in the custody and control of the receiver of this court.

Second. That the additional assessment of \$539,950 levied and assessed by the assessor of the county of Bernalillo for the year 1894, is a valid assessment, and the tax levied thereon for the said year is a valid lien upon the property and franchises of the said railroad company, now in the custody and control of the receiver of this court.

Third. That the additional assessment of \$539,950, together with a twenty-five per cent. penalty added to said amount, levied and assessed by the assessor of the county of Bernalillo for the year 1895, is a valid assessment and that the tax levied thereon for the said year 1895 is a valid lien upon the property and franchises of the said railroad company now in the custody and control of the receiver of this court.

It is further ordered, adjudged and decreed by the court that the said matter of the intervening petition of the Territory of New Mexico be and it is hereby referred to Owen N. Marron, special

107 master in the above-entitled cause, to report to the court what taxes, penalty and interest are due from the said railroad company and from the said receivers heretofore appointed for the years 1893, 1894 and 1895 respectively.

And the said master having here now filed his report as to the amount of taxes due to the said petitioner and having reported that the amount of taxes due for the year 1893, without penalty, is the sum of \$13,900.78, and for the year 1894, without penalty, is the sum of \$12,768.78, and for the year 1895, is the sum of \$16,585.14, making a total of the amount of taxes due to the said petitioner for the years 1893, 1894 and 1895, of \$43,254.70. The court being fully advised, it is further ordered, judged and decreed that the said report of the said special master be and the same is hereby approved and confirmed.

It is further considered, adjudged and decreed by the court that the receiver herein forthwith pay to the county collector of the said county of Bernalillo, the said sum of \$43,254.70, being the amount of taxes due from the said railroad company and the receiver thereof for the said years 1893, 1894 and 1895, and that he take the receipt of the said collector therefor.

And thereupon comes the complainant, The United States Trust Company of New York, and also comes C. W. Smith, as receiver, and each of said parties prays an appeal herein from the judgment and decision of the court, requiring the receiver to pay the taxes, to the supreme court of the Territory of New Mexico, and the court being duly advised in the premises, orders, adjudges and decrees that an appeal herein be, and it is hereby granted to the complainant, The United States Trust Company, and also to the said C. W. Smith, as such receiver, from the judgment and decision of the court herein, to the supreme court of the Territory of New Mexico.

108 And it is further considered and adjudged, that, as the property upon which said taxes were levied, and the funds wherewith to pay the same are in the custody and control of this court, that, pending the final determination of the appeals herein granted, the execution of this decree be stayed without giving any supersedeas.

N. C. COLLIER, *Judge*.

TERRITORY OF NEW MEXICO, }
Second Judicial District Court, } ss:

I, O. N. Marron, clerk of the district court of the second judicial district of the Territory of New Mexico, do hereby certify that the above and foregoing is a true, correct and complete transcript of the record and proceedings had in the matter of the intervening petition of the Territory of New Mexico in a cause pending in said court entitled The United States Trust Company of New York against The Atlantic and Pacific Railroad Company and others, No. 1122, according to the stipulation of the respective parties on file in said cause, as to what should constitute the record on appeal from the judgment of the court in the matter of the said intervening petition.

In witness whereof, I have hereunto set my hand
[SEAL.] and affixed the seal of the said court this 29th day of
June, 1896.

O. N. MARRON, *Clerk.*

109 And afterward, to wit, on July 25th, 1896, there was filed
in the office of the clerk of the supreme court of the Terri-
tory of New Mexico an assignment of errors; which said assignment
of errors are in the words and figures following, to wit:

THE UNITED STATES TRUST COMPANY, Complainant,	}
<i>vs.</i>	
THE ATLANTIC & PACIFIC RAILROAD COMPANY <i>et al.</i> , Defendants.	}

In the matter of the intervening petition of the Territory of New
Mexico.

THE UNITED STATES TRUST COMPANY OF NEW YORK and C. W.	}
Smith, Receiver of the Property of the Atlantic & Pacific Rail- road Company, Appellants,	
<i>vs.</i>	}

THE TERRITORY OF NEW MEXICO, Appellee.

Joint and several assignment of errors on behalf of the appellants.

110 *Assignment of Errors.*

First. That the court below erred in holding that the additional assessment of \$539,950.00 levied and assessed by the assessor of the county of Bernalillo for the year 1893, as property omitted for that year and placed upon the assessment-roll for the year 1895, was a valid assessment, and that the tax levied thereon in the year 1895, was and is a valid lien upon the property and franchises of said railroad company now in the custody and control of the receiver of that court.

Second. That the court below erred in holding that the additional assessment of \$539,950.00, levied and assessed by the assessor of the county of Bernalillo, for the year 1894, as property omitted for that year and placed upon the assessment-roll for the year 1895, was a valid assessment, and that the tax levied thereon in the year 1895, was and is a valid lien upon the property and franchises of said railroad company now in the custody and control of the receiver of that court.

Third. That the court below erred in holding that the additional assessment of \$539,950.00, together with the 25 per cent. penalty added to such amount levied and assessed by the assessor of the county of Bernalillo as property omitted to be returned for the year 1895, was and is a valid assessment, and that the tax levied thereon for the said year 1895, is a valid lien upon the property and franchises of the said railroad company now in the custody and control of the court.

Fourth. The court below erred in holding and decreeing that the receiver should pay to the treasurer of the county of Bernalillo the

111 sum of \$43,254.70, as taxes due from the Atlantic & Pacific Railroad Company and the receiver thereof for the years 1893, 1894 and 1895, upon property placed on the assessment-roll by the assessor of Bernalillo county as omitted property, and erred as to the amount ordered to be paid as taxes for each of said years.

C. N. STERRY,
KARL A. SNYDER,
Solicitors for the Receiver, C. W. Smith, Appellant.
EDWARD W. SHELDON,
FREDERICK B. JENNINGS,
Solicitors for the Complainant, The United States Trust Company, Appellant.

112 And afterwards, at a regular term of the supreme court of the Territory of New Mexico begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on the last Monday of July, 1896, the same being Monday, July 27th, 1896, on the fourteenth day of said term, the same being Tuesday, August 11th, 1896, the following, among —, proceedings were had, to wit :

THE UNITED STATES TRUST COMPANY OF	} No. 670. Appeal from Bernalillo County.
NEW YORK	
<i>vs.</i>	
ATLANTIC & PACIFIC R. R. Co. <i>et al.</i>	

In the matter of the intervening petition of The Territory of New Mexico, appellee; The United States Trust Company of New York and C. W. Smith, receiver of the property of the Atlantic & Pacific R. R. Co., appellants.

It is ordered by the court that this cause be, and the same hereby is, set down for hearing at the foot of the docket upon Tuesday, August 18th, 1896.

113 And afterwards, on the twenty-second day of said term of said court last aforesaid, the same being Thursday, August 20th, 1896, the following, among other, proceedings were had, to wit :

THE UNITED STATES TRUST COMPANY OF	} No. 670. Appeal from Bernalillo County.
NEW YORK	
<i>vs.</i>	
ATLANTIC AND PACIFIC R. R. Co. <i>et al.</i>	

In the matter of the intervening petition of The Territory of New Mexico, appellee; The United States Trust Co. of New York and C. W. Smith, receiver of the property of the Atlantic and Pacific R. R. Co., appellants.

This cause, coming on for hearing upon the transcript of record, assignment of errors, and briefs of counsel on file, is argued by C. N. Sterry, Esq., for said appellants, and by F. W. Clancy and Thomas

N. Wilkerson, Esqrs., and John P. Victory, Esq., for appellees, and the court hears a portion of the arguments.

And afterwards, on the twenty-third day of the term of court last aforesaid, the same being Friday, August 21st, 1896, the following, among other, proceedings were had, to wit :

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| 114 THE UNITED STATES TRUST COMPANY
OF NEW YORK
<i>vs.</i>
ATLANTIC AND PACIFIC R. R. Co. <i>et al.</i> | } | No. 670. Appeal from
Bernalillo County. |
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In the matter of the intervening petition of The Territory of New Mexico, appellees; The United States Trust Co. of New York and C. W. Smith, receiver of the property of the Atlantic and Pacific R. R. Co.

This cause, coming on for further hearing, is argued by said attorneys and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, on the forty-fourth day of the term of court last aforesaid, the same being Friday, December 18th, 1896, the following, among other, proceedings were had, to wit :

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|---|---|--|
| 115 THE UNITED STATES TRUST COMPANY
of New York and C. W. Smith,
Receiver of the Property of the Atlantic
and Pacific R. R. Co., Appellants,
<i>vs.</i>
ATLANTIC AND PACIFIC R. R. Co. <i>et al.</i> | } | No. 670. Appeal from
Bernalillo County. |
|---|---|--|

In the matter of the intervening petition of The Territory of New Mexico, appellee.

This cause having been argued by counsel and submitted to and taken under advisement by the court at a former day of this term, and the court, being now sufficiently advised in the premises, announces its decision by Chief Justice Smith, Associate Justices Laughlin and Hamilton concurring, Associate Justice Bantz concurring as to the ("exemptions of the right of way, including the road-bed, ties, culverts, bridges, etc., but dissents as to the exemptions of the grounds necessary for station-houses, workshops, depots, etc., or the improvements thereon,") reversing the decree of the court below in this cause for reasons stated in the opinion of the court on file. It is therefore considered, adjudged, and decreed

- 116 by the court that the decree of the district court within and for the second judicial district of the Territory of New Mexico from which the appellants in this cause appealed to this court be, and hereby is, reversed and set aside, and in accordance therewith it is ordered that the intervening petition of The Territory of New Mexico, the appellee herein, filed in said cause in said district court be, and the same is hereby, denied and dismissed, and that the said

appellee take nothing thereby, and that the said The United States Trust Company of New York and C. W. Smith, as receiver of the property of the Atlantic and Pacific Railroad Company, appellants herein, do have and recover of and from the said appellee their costs in this behalf expended, including all their costs in the court below as well as those in this court, and that execution issue therefor. The court doth find further that the right of way of the Atlantic and Pacific Railroad Company consists of one hundred feet

117 in width on each side of its track, the road-bed, track, ties and rails, and all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations, and the road-bed, ties, rails, bridges, culverts, telegraph line, station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, water tanks, and improvements thereon and attached thereto for the purpose of operating, maintaining, and enjoying said railroad and telegraph line, and the said right of way as above designated is exempt from taxation within the Territory of New Mexico under and by virtue of the act of Congress approved July 27th, 1866, incorporating said company; and the court doth further find that the assessment for taxation of said right of way and necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations and of the improvements placed thereon in the county of Bernalillo, New Mexico, for the years 1893, 1894, and 1895 was and is illegal and void, and all taxes and penalties levied thereon for said years were and are unlawfully and illegally levied and assessed and are void.

118 And afterwards there was filed, on December 28th, 1896, in the office of the clerk of the supreme court of the Territory of New Mexico a petition for rehearing; which said petition is in the words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1896.

TERRITORY OF NEW MEXICO, Intervenor and Appellee, }
 vs. }
 ATLANTIC & PACIFIC RAILROAD, Appellant.

Now comes the said intervenor and appellee, by her solicitor general, John P. Victory, Esq., and prays the court to set aside the decree entered herein at a former day of the present term and to grant a rehearing upon the said appeal for the following reasons:

1. As one of the things essential to the opinion of the court, the court declares that territorial governments possess neither sovereignty nor prerogative, but enjoy by the grace of Congress privileges enumerated in the charter of their existence, and has
 119 evidently overlooked the fact that by authoritative decisions of the Supreme Court of the United States it has been in effect declared that territorial legislatures possess practically unlimited power, subject only to such restrictions as have been declared

by Congress in its statutes and as are to be found in the Constitution of the United States.

Hornbuckle *vs.* Toombs, 18 Wal., 655-'6.

Clinton *vs.* Engelbrecht, 13 Wal., 434.

2. The court holds in effect that the legislative power of a Territory is of a very narrow and limited character, because it is subordinate to the authority of Congress, whereas the legislative power of a Territory within the few limitations imposed by Congress is as great as that which Congress itself might exercise.

See cases above cited.

3. The court applies to a statutory exemption from taxation the liberal rule of construction adopted by the Supreme Court of the United States as to statutory donations or gifts, such as grants of land, such application being contrary to all the decisions of said Supreme Court as to exemption from taxation.

120 4. The court expands a legislative exemption of a right of way from taxation to an exemption of every kind of property which the railroad company can possibly possess, except, perhaps, its rolling stock, and it is not clear that the reasoning of the court as to the intent of Congress will not require the exemption even of the rolling stock.

5. The reasoning of the court as to the probable intent of Congress in exempting the right of way from taxation and its conclusion that to limit the exemption to the letter of the statute would be in contravention of the spirit that actuated Congress in granting the franchise lose their force when attention is called to the fact that such exemption was a matter of minor importance, and that other privileges and powers, such as the power of eminent domain and the donation of materials to be taken from the public lands and of an enormous quantity of land, amounting to many millions of acres, were conferred and given by the act of Congress creating the railroad company.

121 In other words, the opinion of the court magnifies the importance of what was by its language an insignificant provision of the statute and does so for the avowed purpose of effectuating the intent and spirit of the act of Congress, as though there were nothing else in the act to accomplish that purpose, when, as a matter of fact, the other valuable privileges and donations are much more than enough to give full effect to what Congress intended.

JNO. P. VICTORY,

Solicitor General for New Mexico.

THOS. N. WILKERSON,

FELIX H. LESTER,

F. W. CLANCY,

Counsel.

122 And afterwards, on February 4th, 1897, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a certificate of counsel on motion for rehearing; which said certificate is in the words and figures following, to wit:

In the Supreme Court of New Mexico, July Term, A. D. 1896.

TERRITORY OF NEW MEXICO	} No. 670.
vs.	
ATLANTIC & PACIFIC R. R. Co. <i>et al.</i>	

We do hereby certify that the petition for a rehearing heretofore filed in the above-entitled cause is in our opinion well founded in matter of law; that it is made in good faith, and that it is not for any purpose of delay.

JNO. P. VICTORY,
Solicitor General for New Mexico.

THOS. N. WILKERSON,
F. W. CLANCY,
FELIX H. LESTER,
WM. H. POPE,
Counsel.

123 And afterwards, on March 1st, 1897, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a motion praying for an appeal; which said motion is in words and figures following, to wit:

In the Supreme Court of the Territory of New Mexico.

THE TERRITORY OF NEW MEXICO, Intervenor and Appellee,	} No. 670.
vs.	
THE ATLANTIC AND PACIFIC RAILROAD, Appellant.	

The above-named The Territory of New Mexico, by her solicitor general, John P. Victory, conceiving herself aggrieved by the judgment entered herein on December 18th, 1896, in the above-entitled cause, doth hereby appeal from said judgment to the Supreme Court of the United States, and prays that this appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said judgment was entered, duly authenticated, may be sent to the Supreme Court of the United States.

JNO. P. VICTORY,
Solicitor General of New Mexico.

124 And afterwards, on the forty-seventh day of the term of court last aforesaid, the same being Monday, March 1st, 1897, the following, among other, proceedings were had, to wit:

THE UNITED STATES TRUST COMPANY OF
New York and C. W. Smith, Receiver of
the Property of the Atlantic and Pacific
Railroad Company, Appellants,

vs.

ATLANTIC AND PACIFIC RAILROAD COM-
PANY.

No. 670. Appeal from
District Court of
Bernalillo County.

In the matter of the intervening petition of the Territory of New Mexico, appellee.

This cause coming on to be heard on the application of counsel for appellee for leave to amend its motion for rehearing heretofore filed by filing a certificate of counsel, as provided by the rule of this court, it is ordered by the court that said appellee be, and it is hereby, granted leave to file said certificate of counsel; and it is further ordered by the court that the motion for rehearing herein be, and the same is hereby, denied, and thereupon the appellee

125 moves the court for an appeal from the judgment and decision of this court to the Supreme Court of the United States, and the court, being fully advised in the premises, grants said appeal. It is therefore considered and adjudged by the court that the appellee herein, The Territory of New Mexico, be, and it is, allowed an appeal from the judgment and decision of this court to the Supreme Court of the United States.

126 And afterwards there was filed on March 10th, 1897, in the clerk's office of clerk of the supreme court of the Territory of New Mexico, a citation to U. S. Supreme Court; which said citation is in words and figures following, to wit:

UNITED STATES OF AMERICA, *ss*:

To the United States Trust Company of New York and C. W. Smith, receiver of the property of the Atlantic & Pacific Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on, to wit, sixty days from and after the date of the signing of this citation, pursuant to an appeal allowed by the supreme court of New Mexico on the first day of March, A. D. 1897, wherein The Territory of New Mexico is appellant and you are respondents and appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

127 Witness the honorable chief justice of the supreme court of New Mexico this 6th day of March, A. D. 1897.

THOMAS SMITH,
Chief Justice Supreme Court of New Mexico.

I hereby acknowledge service of the foregoing citation for and on behalf of said respondents and appellees.

C. N. STERRY.
KARL A. SNYDER.

Mar. 8, 1897.

128 And heretofore, to wit, on the 18th day of December, A. D. 1896, there *was* filed in the office of the clerk of the supreme court of the Territory of New Mexico the opinions of the judges of said court in said cause, which *is* herewith annexed and transmitted with this record in accordance with the rules of the Supreme Court of the United States; which said opinions are in the words and figures as follows, to wit:

THE UNITED STATES TRUST COMPANY OF NEW YORK,	} No. 670.
Complainant,	
<i>vs.</i>	
THE ATLANTIC & PACIFIC RAILROAD COMPANY <i>et al.</i>	

In the matter of the intervening petition of The Territory of New Mexico.

THE UNITED STATES TRUST COMPANY OF NEW YORK and C. W.	}
SMITH, as Receiver, Appellants,	
<i>vs.</i>	
THE TERRITORY OF NEW MEXICO, Appellee.	

Statement of the Case.

This is an appeal from an order of the district court of Bernalillo county, sitting as a court for the hearing and trial of causes
129 arising under the Constitution and laws of the United States, taken by the receiver appointed by it of the property of the Atlantic & Pacific Railroad Company and by The United States Trust Company, complainant in that action. The order required the receiver to pay to the treasurer of Bernalillo county taxes aggregating the sum of \$43,254.70, which were levied upon property placed upon the assessment-roll in the year 1895 by the assessor as property omitted by the railroad company to be returned for the year 1893, as property omitted to be returned for the year 1894, and as property omitted to be returned for the year 1895, with 25 per cent. penalty added for the year 1895, the separate amounts of this aggregate being \$13,978.00 for 1893, \$12,768.78 for the year 1894, and \$16,585.14 for the year 1895.

The Atlantic & Pacific Railroad Company was incorporated by the act of Congress of the United States approved July 27th, 1866. Among the provisions contained in its charter was the provision
130 contained in section one, authorizing the company to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line from Springfield, Missouri, to the Pacific ocean, practically along the thirty-fifth parallel of latitude, and granting to it in the second section a right of way through the

public lands two hundred feet in width, with sufficient grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations; also the power to acquire a right of way and station grounds of the same character through private lands by condemnation proceedings provided for in the act.

The second section of the act exempted from taxation within the Territories of the United States the right of way. The sections referred to and others of the character are hereafter in the brief set out in full.

The Atlantic & Pacific Railroad Company afterwards constructed its line of road from Isleta Junction (15 miles west of Albuquerque) to the Colorado river, and maintained and operated the same to such point and beyond from the year 1882 up to the present time,

except that in January, 1894, receivers were appointed in
131 foreclosure proceedings, commenced in the second judicial district court of the Territory of New Mexico, for the property of the Atlantic & Pacific railroad, and such receivers took possession of and operated said railroad up to February 1st, 1896, when in another foreclosure proceeding and in the same one the present receiver, C. W. Smith, was appointed receiver of the property of the Atlantic & Pacific Railroad Company in New Mexico, Arizona, and California.

In the year 1893 the railroad company returned for assessment to the assessor of Bernalillo county property of the value of \$530,960.00, and for the year 1894 the receivers returned property to the same value, and for the year 1895 the receivers returned property to the same value; that during none of these years was the right of way, station grounds, or superstructure thereon returned for taxation by the company or by the receivers, as each claimed that the same was exempt from taxation.

In the year 1895 the assessor of Bernalillo county, under
132 instructions of the board of county commissioners, assessed as personal property (describing the same as such) the entire superstructure of the railroad on its right of way and station grounds in Bernalillo county, although each and every part of the property so described and assessed was attached to and a part of the right of way and station grounds of the railroad company. A tax was levied upon each of these assessments, and subsequently, in March, 1896, the Territory, upon permission of the court, filed in the foreclosure case of the United States Trust Company an intervening petition to recover such taxes (printed Tr., pp. 56 to 57). An order to show cause why the intervening petition should not be granted was properly served upon the parties to the foreclosure suit, and subsequently The United States Trust Company, the complainant in the foreclosure suit, and C. W. Smith, the receiver appointed in such suit, filed answers showing cause why the intervening petitions should not be granted. (Printed Tr., pp. 78 to 89.)

Subsequently an agreed statement of facts was made between the parties and the cause submitted and heard upon such agreed
133 statement of facts. (See printed Tr., pp. 90 to 96, inclusive.) Subsequently the court found that these assessments were

valid and ordered the receiver to pay out of the property and funds in his hands the sum of \$43,254.70 (printed Tr., pp. 97 to 105, inclusive) to the treasurer of the county. A stipulation was made between the parties, in which the Territory entered its appearance herein and in which it was agreed as to the parts of the record which should constitute a transcript in this case. (Printed Tr., pp. 4 to 5, inclusive.)

Assignment of Errors.

First. That the court below erred in holding that the additional assessment of \$539,950.00, levied and assessed by the assessor of the county of Bernalillo for the year 1893, as property omitted for that year and placed upon the assessment-roll for the year 1895 was a valid assessment, and that the tax levied thereon in the year 1895 was and is a valid lien upon the property and franchises of said railroad company now in the custody and control of the receiver of that court.

134 Second. That the court below erred in holding that the additional assessment of \$539,950.00, levied and assessed by the assessor of the county of Bernalillo for the year 1894, as property omitted for that year and placed upon the assessment-roll for the year 1895 was a valid assessment, and that the tax levied thereon in the year 1895 was and is a valid lien upon the property and franchises of said railroad company now in the custody and control of the receiver of that court.

Third. That the court below erred in holding that the additional assessment of \$539,950.00, together with the 25 per cent. penalty added to such amount, levied and assessed by the assessor of the county of Bernalillo as property omitted to be returned for the year 1895 was and is a valid assessment, and that the tax levied thereon for the said year 1895 is a valid lien upon the property and franchises of the said railroad company now in the custody and control of the court.

135 Fourth. The court erred in holding and decreeing that the receiver should pay to the treasurer of the county of Bernalillo the sum of \$43,254.70, as taxes due from the Atlantic & Pacific Railroad Company and the receiver thereof for the years 1893, 1894, and 1895, upon property placed on the assessment-roll by the assessor of Bernalillo county as omitted property, and erred as to the amount ordered to be paid as taxes for each of said years.

Opinion.

SMITH, C. J.:

It has been adjudicated by the court of last resort, "Railroad Company vs. Peniston, 18 Wallace, page 5," that the States can impose a tax upon the property of corporations chartered by Congress, as agents, to subserve the lawful purposes of the Government, provided that such tax does not deprive such organizations of the power to serve the Government as they were intended to serve it or does not hinder the efficient exercise of their power. It is difficult to appreciate that the legality of a tax must be determined by its effect ;

that its constitutionality is contingent upon its operation, and it is suggested that if such consideration is decisive the issue is not one of right, but of feasibility. The same case affirms the distinction

before made by the said tribunal between the franchise and
 136 the property of such corporations, pronouncing the one exempt from taxation by the States and the other liable to assessment, upon the ground that the one is upon the operations of said corporations and the other upon their possessions—their property—it being represented that existence in the one case is involved, but in the other efficiency only.

If the tax is right or wrong, legal or unauthorized, according to its effect, it would seem that it can be placed upon the franchise, as well as upon the property, provided it should not deprive the corporations of the power to fulfill the purposes for which they were created by Congress. Banks are not rendered inefficient or failures by a tax upon the right to do business, nor are railroads forced into liquidation by the exactions of the States whose area they traverse.

However, *res adjudicata* by the Supreme Court of the United States constitutes the law, and it is now established as the attribute of the nominal sovereignty of States that they are supreme in their power of taxation upon the property within their jurisdiction, with the qualification, however, that they cannot so exercise this power as to

arrest or impair the operations of the General Government;
 137 but it is yet to be determined whether the Territories are equally absolute in their domain. Territorial governments are the anomalous creatures of the Congress of the United States, conceived, presumably, from the necessity of the conditions; they possess neither sovereignty nor prerogative, but enjoy by the grace of Congress privileges specifically enumerated in the charter of their existence.

It cannot be conceived that Congress in any contingency contemplated that the Territories should assume powers which it surrendered in the interest of the public or interfere with its policy for the country's comfort and safety. It would not be legitimate for Congress to confer franchises accompanied with inducements to procure their acceptance and to promote their operation, and, having received the desired and expected benefits, to repudiate the favors granted, and it would seem that to allow the Territories to ignore its guaranty would be not less culpable than to do it itself.

Section 20 of the act incorporating the Atlantic and Pacific Railroad Company declares the object of the act to be to promote the public interest and welfare by the construction of said railroad
 138 and telegraph line and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes. Congress deemed it paramount for the country to be so connected with its exposed western coast that it could be protected in the event of hostilities, and, recognizing the probability of antagonism of interests between the sections remote from each other and without the facility of communication, incorporated the Atlantic and Pacific Railroad Company to construct a railroad and

telegraph line, and to promote the accomplishment of said object bestowed privileges upon said company in the interest of the welfare of the public and to secure to the Government at all times the use and benefit of such road for postal, military, and other purposes.

Section two of said act of incorporation is as follows:

"And be it further enacted, That the right of way through the public lands be, and the same is hereby granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for
139 the construction of a railroad and telegraph as proposed.

* * * Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water stations; and the right of way shall be exempt from taxation within the Territories of the United States."

Section 3 of said act grants "to the Atlantic and Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war and public stores over the route of said line of railway and its branches," alternate sections of the public domain. It is manifest that Congress appreciated the magnitude of the enterprise proposed, and recognized that the expenditure and difficulties involved would not be encountered except for substantial advantages that might eventually be profitably utilized. It be-
140 stowed franchises that contained privileges, and yet so connected with burdens, it recognized that one would not be available unless there was partial relief from the other by exemption from taxation and the donation of land.

The right of way was granted and its exemption from taxation within the Territories of the United States declared. It must be recognized that Congress acted in good faith, and intended to contribute material, not nominal assistance, to the company for the construction of the railroad and telegraph line for the convenience of the Government at all times and in the interest and welfare of the public. The alternate sections were granted to aid, it may be said, to secure the construction of said railroad for the safe and speedy transportation of the mails, troops, munitions of war, and public stores over the route of the said line of railway, and doubtless the right of way exempt from taxation was conceded to encourage the company to embark in the hazardous experiment. Congress, presumably being cognisant of the character of the country along the 35th parallel of latitude, cannot
141 be suspected in giving a right of way to have intended to convey valueless barren land only, as such consideration would neither encourage nor aid in the construction of the railroad. Congress, in announcing the object of the act of incorporation, distinctly discloses that it regarded the construction of a railroad between the proposed termini a necessity so imperative that it reserved

the right to make any alterations or amendments to the act to promote the accomplishment of its object or to repeal it altogether should it prove an obstacle to the construction of the said road; and it is logical, indeed inevitable, that the concessions to the company should be construed with a view to carry out the congressional conception. The right of way granted is practically nothing, if merely the one hundred feet on either side of the roadway, and it is plain that such restriction would be in contravention of the spirit that actuated Congress in granting the franchise, and it may be that if such construction had been apprehended the franchise would have

been neither sought nor accepted. Congress proposed the
142 construction of the railroad for the lawful purposes of the

Government and for the interest and welfare of the public, and tendered the inducements it deemed sufficient to secure it—not the right of way over the land, but the right for a railway; not the right to the soil only, but the right to a road-bed; not the right to a road-bed only, but to a road-bed equipped with ties and rails to constitute a railway over which cars could be conducted for the lawful purposes of the Government; not only the right to a road-bed so furnished, but to a railroad provided with the fixtures essential to the fulfillment by the corporation of the purposes for which it was created. If such were the purpose of Congress it should be deferred to by the Territories, and no attempt inconsistent with it is legitimate. Congress, having secured for the country a valuable connection in the system uniting the two oceans, recognized that it has received full consideration for the privileges conferred and has not attempted to impair them, and it seems that the Territories

having received incalculable advantages from the construc-
143 tion of the railroad through an area that appeared irredeemable, rendering it practicable for occupation and creating opportunities for the development of its resources, should not only forbear the effort to impose burdens upon it, but should foster it by generosity in the recognition of its rights and in the bestowment of favors. The intention of Congress should be broadly recognized and its spirit graciously respected.

We have indulged in these observations as suggestive of the considerations which should be potential in the construction of the act in question, and we will not apply them. It does not appear material whether the grant of the right of way created a fee or an easement, as in either event the exemption from taxation attaches. It is difficult, however, to conceive any reason for the contention that the grant by Congress of a right of way for the construction of a railroad does not operate commensurately with all other grants from the Government. Grants of land by Congress to aid in the construction of a railroad surrender the title of the Government, and

the lands do not revert, after condition broken, until for-
144 feiture has been asserted by the United States, either through judicial proceedings instituted under authority of law for that purpose or through some legislation equivalent to a judgment of office found at common law. *St. Louis Railroad Company vs. McGee*, 115 U. S., p. 469 to 473.

It will be deemed, it is to be presumed, that the right of way was granted to the "A. & P." corporation to aid in the construction of a railroad, and it cannot be legitimately contended that the lands so conveyed could revert to the Government upon condition broken except through proceedings instituted by the Government. The United States only can enforce forfeiture of its lands granted, and the title to the right of way must, consequently, remain in the grantees until the grantor resumes it on account of the grantees' failure to earn it. No individual can assail the title of the Government as conveyed on the ground that the grantee has failed to perform the conditions annexed. 21 Wall, p. 44.

Railroad *vs.* Baldwin, 103 U. S., 430, contains the following:
 145 "The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the lands. For any loss of lands by settlement or reservation other lands are given, but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route."

In *Bybee vs. Oregon & California Railroad Co.*, 139 U. S., p. 679, it is declared that the distinction between a right of way over the public lands and lands granted in aid of the construction of the road is important in this connection. As to the latter the rights of settlers and others who acquire lands by purchase or occupation between the passage of the act and the actual location and identification of the lands are preserved unimpaired, while the grant of the right of way is subject to no such condition. It will be observed
 146 that these decisions establish that the grant of a right of way is, if anything, more absolute and of greater degree than the grants of alternate sections of land.

The Supreme Court of the United States in *Railroad Company vs. Baldwin*, 103 U. S., 429, has declared that acts similar to that under consideration are a present grant and import a transfer of interest, so that when the route is definitely fixed the title attaches from the date of the act. It says: "The grant of the right of way by the 6th section contains no reservations or exceptions; it is a present, absolute grant, subject to no conditions, except those necessarily implied, such as that the road shall be constructed and used for the purposes designated; nor is there anything in the policy of the Government with respect to the public land which would call for any qualification of the term.

These lands would not be the less valuable for settlement by a road running through them; on the contrary, their value would be greatly enhanced thereby."

Says the court in the opinion above referred to, 139 U. S., p. 674:
 147 "The act making the grant in aid of this road does not in its words of conveyance differ materially from a large number of similar acts passed by Congress in aid of the construction of roads in different parts of the West, which have been considered
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by this court as taking effect *in præsenti*, although the particular lands to which the grant is applicable remain to be selected and identified when the road is located and the map is filed with the Secretary of the Interior."

In 152 U. S., p. 116, *Missouri, Kansas and Texas Railway vs. Roberts*, it is announced, not as *obiter dictum*, but as the court's conclusion upon an issue involved, that the right of way granted by Congress to the Missouri, Kansas & Texas railway, through lands reserved for the use and occupation of the Osage Indians, vested the title to the lands appropriated for said way, to wit, 200 feet in width, in said company, either upon the passage of the act or the construction of the road.

The supreme court of Oklahoma, on Sept. 10, 1896, decided as follows in the case of *Churchill vs. Choctaw R'y Co.* :

148 "An act of Congress investing and empowering a railway company with the right of way of locating, constructing, owning, equipping, operating, using, and maintaining a railway through and over public land, and providing that said company is authorized to take and use for all purposes of a railroad a right of way over said public land, is a present, absolute grant."

We can but accept these authorities as conclusive as to the effect of a grant of a right of way by Congress to aid in the construction of a railroad through the public domain. That the title of the Government to the lands granted to the company passes absolutely to the company, we must regard as adjudicated, and we will now address ourselves to the consideration of the elements that compose a right of way as intended by Congress.

The general rule is that fixtures once annexed to the freehold become part of the realty when the intention is clear that it should be permanently connected with it.

It will not be contended that the ties and rails were temporarily affixed to the road-bed or that they could be removed without material injury to the freehold. Being annexed to the road-bed for continuous use and the road-bed being valueless without them, they become as much a part of the right of way as the road-bed. Attached to the road-bed they are absolutely subject to the mortgages on the road at the time of their attachment, and foreclosure involves them no less than the road-bed. Says the Supreme Court of the United States in *Porter vs. Pittsburg Bessemer Steel Co.*, 122 U. S., p. 267, 283 :

"Rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage will be held by the lien of such mortgage in favor of *bona fide* creditors as against any contract between the furnisher of the property and the railroad company containing stipulations" that the title to the property shall not pass till the property is paid for and reserving to the vendor the right of removing the property.

In *United States vs. New Orleans Railroad Company*, 12 Wall., p. 362, it is stated that if the company give a mortgage for the purchase-money at the time of the purchase, such mortgage, whether registered or not, has precedence of the general mortgages.

150 This rule, however fails when the property purchased is an-

nexed to a subject already covered by the general mortgage and becomes part thereof, as when iron rails are laid down, and becomes part of the railroad.

In the case of *The United States vs. Denver & Rio Grande Railway*, 150 U. S., p. 12, it is declared that all necessary appurtenances of all railroads may fairly — regarded as parts or portions of the railroad whose construction it was the purpose of Congress to aid.

In its ordinary acceptation and large sense the term "railroad" fairly includes all structures which are necessary and essential to its operation. As already stated, it was not the intention of Congress to aid in the mere construction of the road-bed or roadway, but to aid in the construction of the railroad as such, which term has a far more extended signification than the mere track or roadway.

If the language of the act had shown an intention merely to aid in the construction of the road-bed or roadway it is clear
151 that such structures as station-houses, etc., would not have — included, etc.

It is true that the exemption from taxation by a State is construed with strictness in favor of a State, but it will be observed that this discrimination exists where the exemption is the act of the State as to the property within its jurisdiction, not a privilege derived from the General Government for the benefit and welfare of the public in the Territory belonging to the United States. The Atlantic and Pacific corporation has received no grant from the Territory of New Mexico, and there is no issue between them as to the extent of benefits conferred upon one by the other, and it is not, we conceive, legitimate in arriving at the rights of the Territory in the premises to consider it as though it had created a factor and was exacting tribute for its favor. The United States presents no problem, asserts no claim, having, by long acquiescence in the immunity of the company from taxation, conceded that it was in conformity with its intention. Were the controversy between the Government and the company the grant should, in the language of the Supreme

Court, 150 U. S., p. 14, receive a liberal construction in favor
152 of the purposes for which it was enacted, and it must be recognized that it would be illegal and oppressive to substitute a different construction between the company and the Territory to settle their respective rights. The company derives its rights from Congress, and they should be ascertained and determined by rules that will evolve the intention of Congress, and not by principles in the interest of a local government.

In *Winona & St. Peter Railroad vs. Barney*, 113 U. S., 618, 625, Mr. Justice Field, speaking for the court, says: The acts making grants are to receive such a construction as will carry out the intention of Congress, however difficult it may be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as the purposes declared on their face, and read all parts of them together.

Mr. Justice Jackson, in *U. S. vs. Denver & Rio Grande Railway Co.*, 150 U. S., p. 14, in quoting the above rule as
153 announced by Mr. Justice Field, says:

"Looking to the condition of the country and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act operating as a general law and manifesting clearly an intention of Congress to secure public advantages or to subserve the public interest and welfare by means of benefits more or less valuable offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi-public character in or through the immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant and should receive at the hands of the court a more liberal construction in favor of the purpose for which it was enacted."

In *Northern Pacific Railroad Company vs. Carland*, 3 Pac. Rep., 144, the court, says Chief Justice Wade, after citing certain authorities, concludes:

154 "It follows from these propositions that the road-bed, the rails fastened to it, station buildings, workshops, depots, machine shops, etc., constructed over, upon, or through the right of way granted to the plaintiffs and attached to the soil and annexed to the easement, becomes a part of the real estate of the railroad company."

Again, quoting from the opinion in the case of *Northern Pacific R. R. Co. vs. Carland*, *supra*: "'It is a general rule that a grant of power to accomplish any particular enterprise, and especially one of a public nature, carries with it, so far as the grantor's own power extends, an authority to do all that is necessary to accomplish the principal object.' 'It is a well-known and reasonable rule, in construing a grant, that when anything is granted, all the means to attain it and all the fruits and effects of it are granted also.' Shaw, C. J., in *Babcock vs. Western R. Corp.*, 9 Metc., 555. Here is a grant of a right of way through the public lands 'for the construction of a railroad and telegraph.'

155 Such a grant carries with it the right to the exclusive possession of the lands described for the purpose aforesaid; to make excavations, cuts, and fills in the soil or ground; to construct a road-bed of suitable width and grade; to lay ties and rails thereon, and to erect upon the lands described as and included in the right of way all buildings, shops, water stations, depots, etc., necessary and suitable to be used in constructing or operating such railroad.

This right necessarily implies property in the ground itself. This property is real estate and the title to it is a legislative grant. By virtue of this grant the railroad company acquired the same interest in the land as if it had received a deed of the land for the purpose of constructing and operating a railroad. The provision contained in section 2 of the act incorporating plaintiff declaring that 'the right of way shall be exempt from taxation within the Territories of the United States' therefore carries with it and exempts from taxation within the Territories the road-bed, the ties

156 and rails thereto attached, and all the station buildings, workshops, etc., necessary for the construction and for operating

said railroad, and the assessment for taxation and levy of tax thereon of 'twenty miles of railroad' in the county of Custer, as mentioned and described in the complaint, which description must include the road-bed, ties, and rails, and all necessary buildings attached to the soil and annexed to the easement of the right of way, was unauthorized and is illegal and void."

We deem the foregoing principles and authorities sufficient to exclude doubt as to the intention of Congress in granting the right of way and exempting it from taxation within the Territories of the United States.

And, further, it appears that the second section of the act incorporating the Atlantic and Pacific Railroad Company expressly includes in the right of way all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations. The second clause of said

157 section reads as follows: "Said way is granted to said railroad company to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water stations, and the right of way shall be exempt from taxation within the Territories of the United States."

It is plain that said clause must be construed with reference to its context, and that by such rule it seems "said way" is identical with the right of way referred to in the preceding clause, and that the exemption accorded by the succeeding clause includes and extends to the necessary grounds for station buildings, etc. The land being, in its virgin state, distinctly exempt, the road-bed being the land so converted, and the appurtenances, rails and ties, station buildings, workshop-, depots, machine shops, necessary for the construction and operation of the railroad, becoming, by annexation, a part of the realty, it is inevitable that the aggregate

158 land, road-bed, rails and ties, and said appurtenances constituted the right of way contemplated by Congress. A less consideration could have been no inducement to the company to accept the franchise, and that it should now be deprived of this advantage distinctly conferred by the supreme authority creating it by a subordinate, dependent body, deriving its existence from the power that created both, would be unjust if not iniquitous. The Atlantic and Pacific corporation within the limits of the act creating it is as complete and independent as the Territory of New Mexico under its organic act.

Both are creatures emanating from the same source, and it cannot be that the latter can impair the rights of the former.

In conclusion it must be recognized that it is incumbent upon the court to be controlled by the manifest purpose of Congress in conferring the franchise upon the Atlantic and Pacific Railroad Company; and as it is palpable that the intention was to contribute substantial aid promotive of the construction of a railroad

159 by such company, we are constrained to the conclusion that the exemption accorded must be construed to include the fix-

tures essential to the establishment and operation of the road—the rails and ties are not more a part of the realty exempt than are the structures attached, as station-houses, etc.—and the one is not more indispensable to the completion of the road than are the others to its utilization for the accommodation of the Government.

We are therefore of the opinion that the right of way, including road-bed, ties and rails, station buildings, workshops, depots, machine shops, etc., is not liable to taxation in the county of Bernalillo, Territory of New Mexico, and the decree of the lower court is accordingly reversed.

THOMAS SMITH, *C. J.*

N. B. LAUGHLIN, *A. J.*

I concur in the conclusion reached by the court.

H. B. HAMILTON, *A. J.*

160

THE UNITED — TRUST CO.

vs.

ATLANTIC AND PACIFIC RAILROAD CO. }

I cannot agree with my associates in the conclusion reached in this case.

The inquiry is not as to what has been granted, but is as to what has been exempted from taxation. The grant is the right of way, including necessary grounds for station-houses, shops, depots, etc. It is not material whether that grant conveyed the ownership of the soil or only an easement. It is not everything which the grantee erects thereon or affixed thereto which is exempt, but the thing exempt is the right of way. While it may be that this exemption is broad enough to extend beyond the mere ownership or use of the soil, and may cover such improvements as the road-bed, ties, rails, culverts, and bridges which are affixed to the right of way and necessary to the use of it as such—a proposition by no means clear—I am of the opinion that the exemption does

161 not cover other improvements not essential to the use of the right of way, however convenient and necessary such improvements may be to the orderly and economical conduct of the company's business; nor do I believe that such exemption extends to the additional grounds for station-houses, depots, workshops, etc., or to such improvements thereon. *Portland R. R. vs. City Saco*, 60 Me., 196; *People vs. Tax Com.*, 82 N. Y., 459. If the exemption of a right of way can cover station-houses, workshops, and depots there is nothing to prevent a like exemption from extending to dwelling-houses for lodging employees or hotels for entertaining patrons, when erected on the right of way.

If the exemption extends so far, it must comprehend something more than the right of way and something by implication and liberal implication at that.

Some stress has been laid upon the point that the additional grounds for station-houses, shops, etc., are a part of the right of way; but, in my opinion, this is not well founded. The act does

not make the additional grounds a part of the right of way,
 162 but the act grants the right, "including" all necessary
 ground for station-houses, etc. Grounds additional to the
 right of way are included in the grant, but when we look into the
 clause exempting from taxation we find it does not extend to all
 the property granted, but only and in terms to the "right of way."
 It has been settled by a long line of decisions from *United States vs.*
Arrodondo, 8 Pet., 738, and the *Charles River Bridge* case, 14 Pet.,
 420, that grants from the sovereign are to be construed strictly
 against the grantee, who takes nothing by implication or which is
 not manifestly intended by the clear terms of the grant, and this
 rule applies as well in favor of third persons as it does in favor of
 the power making the grant. This rule is applied for a stronger
 reason and with greater strictness when the grant involves a sur-
 render of one of the great powers essential to government, like that
 of taxation. *U. S. vs. D., R. G. R. R.*, 150 U. S., 1. In a recent case the
 Supreme Court of the United States say; "The taxing power is
 163 essential to the existence of government, and cannot be held
 to have been relinquished in any instance, unless the delib-
 erate purpose of the State to that effect clearly appears. The sur-
 render of a power so vital cannot be left to inference or conceded in
 the presence of doubt, and when the language used admits of rea-
 sonable contention the conclusion is inevitable in favor of the reser-
 vation of the power."

Wilmington & W. R. R. Co. vs. Alsbrook, 146 U. S., 279: It
 does not matter whether the grant which is to operate as a relin-
 quishment of the power of taxation is one made by a State legisla-
 ture or by Congress, its terms are subject to the same rule of
 interpretation; and, unless Congress has exempted this property
 from taxation, the territorial legislature has the same power to tax
 it which it has to tax like property of other owners. Reading the
 act creating this exemption in the light of established judicial de-
 cisions, I am of the opinion that the exemption does not
 164 extend to the additional grounds for station-houses, depots,
 shops, etc., nor to improvements thereon, nor to telegraph
 lines and poles on such right of way.

GIDEON D. BANTZ,

Associate Justice.

165 TERRITORY OF NEW MEXICO, } ss:
Supreme Court,

I, Geo. L. Wylls, clerk of the supreme court of the Territory of
 New Mexico, do hereby certify that the foregoing is a true, full, and
 perfect transcript of the record, assignment of errors, and all pro-
 ceedings had in a certain cause lately pending in said court, wherein
 The United States Trust Company of New York and C. W. Smith,
 receiver of the property of the Atlantic and Pacific Railroad Com-
 pany, were appellants and The Territory of New Mexico was appel-
 lee, together with the opinion of the judges of said supreme court
 in said cause, which is annexed to and transmitted with said record,

in accordance with the rules of the Supreme Court of the United States, as the same remains on file and of record in my office.

Witness my hand and the seal of said supreme court this 7th day of April, A. D. 1897.

[Seal Supreme Court, Territory of New Mexico.]

GEO. L. WYLLYS, *Clerk.*

Endorsed on cover: Case No. 16,578. New Mexico Territory supreme court. Term No., 368. The Territory of New Mexico, appellant, *vs.* The United States Trust Company of New York and C. W. Smith, receiver of the property of the Atlantic & Pacific Railroad Company. Filed May 1st, 1897.

In the Supreme Court of the United States, at the October Term,
1897.

TERRITORY OF NEW MEXICO, Appellant, }
vs. } No. 368.
THE UNION TRUST COMPANY *et al.*

It is hereby stipulated and agreed by and between the parties to the above-entitled cause that the statement of facts certified by the supreme court of the Territory of New Mexico, and to be attached hereto, may be taken and considered as a part of the record in said cause the same as though it had been originally sent up with the transcript of record therein.

F. W. CLANCY,
Solicitor for Appellant.

C. N. STERRY,
Solicitor for Appellee.

Be it remembered that at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, New Mexico, the seat of government of said Territory, on the twenty-sixth day of July, A. D. 1897, and on the thirty-seventh day of said term of said supreme court, the same being Wednesday, the 12th day of January, A. D. 1898, the following, among other, proceedings were had, to wit:

In the Supreme Court of the Territory of New Mexico.

THE UNITED STATES TRUST COMPANY OF NEW YORK }
vs. } No. 670.
ATLANTIC & PACIFIC RAILROAD COMPANY *et al.*

In the matter of the intervening petition of the Territory of New Mexico, appellee.

The appellee having applied to this court for a statement of facts in this case in accordance with the provisions of the act of Congress entitled "An act concerning the practice in territorial courts and appeals therefrom," which became a law on the 7th of April, 1874, to be transmitted to the Supreme Court of the United States, the court hereby certifies that this case was tried in the court below upon an agreed statement of facts; which agreed statement of facts was made part of the record upon appeal to this court and is a part of the record on appeal to the Supreme Court of the United States, and that the said agreed statement sets out the facts of this case

and is hereby adopted by this court as its statement of such facts without here repeating the same.

THOMAS SMITH,
Chief Justice of the Supreme Court of New Mexico,
who Signed this Certificate on Behalf of the Court.

TERRITORY OF NEW MEXICO, {
In the Supreme Court. }

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a true and correct copy of a certificate made by said court and signed by the chief justice thereof in open court in a cause lately pending in said court entitled *The United States Trust Company of New York vs. Atlantic and Pacific Railroad Company et al.*, in the matter of the intervening petition of the Territory of New Mexico, appellee, now on appeal to the Supreme Court of the United States, as the same appears on file and of record in my office.

Witness my hand and the seal of said
 Seal Supreme Court, Ter- supreme court of the Territory of New
 ritory of New Mexico. Mexico this 13th day of January, A. D.
 1898.

GEO. L. WYLLYS, *Clerk.*

[Endorsed:] Case No. 16,578. Supreme Court U. S., October term, 1897. Term No., 368. The Territory of New Mexico, app't, *vs.* The United States Trust Co. of New York *et al.* Stipulation and addition to record. Office Supreme Court U. S. Filed Feb. 14, 1898. James H. McKenney, clerk.

